THE ONTARIO HUMAN RIGHTS CODE,

R.S.O. 1970, c.318, as amended.

IN THE MATTER OF the Complaint of Mr. Barry Adler of Willowdale, Ontario, alleging discrimination in employment by the Metropolitan Board of Commissioners of Police and Police Chief Harold Adamson, 590 Jarvis Street, Toronto, Ontario.

AND IN THE MATTER of the complaints made by Ms. Ann J. Colfer of Toronto, and Ms. Carole McAdam of Ottawa, alleging discrimination in employment by the Ottawa Board of Commissioners of Police and Ottawa Police Chief Leo J. Seguin.

APPEARANCES:

Mr. J. Sopinka) Counsel for the Ontario Human Rights Commission
Mr. Robert Rueter,) and the Complainants.

Mr. R.M. Parker) Counsel for the Metropolitan Board of Commissioners
Mr. George Monteith) of Police and for Police Chief Harold Adamson

Mr. D.V. Hambling, Q.C.) Counsel for Ottawa Board of Commissioners
) of Police and for Police Chief Leo J. Seguin

A HEARING BEFORE: Peter A. Cumming, appointed a Board of Inquiry in the above matters, by the Minister of Labour, The Honourable Bette Stephenson, to hear and decide the complaints.

DECISION AND ORDER IN RESPECT
OF COMPLAINT OF BARRY ADLER

Evidence

Barry Adler completed his Grade 12 in 1973 and has been employed in various positions since then, taking two years toward a B.A. in sociology at York University from 1975 to 1977.

Mr. Adler applied to be a police officer with the Metropolitan Toronto police force in October, 1975. He testified he had also applied in 1973, although the evidence of the police was that they had no record of any such application. This point is of no importance. The sincerity of Mr. Adler's application in October, 1975 was not doubted by the police (Evidence, p. 30) and I have no doubt that Mr. Adler was indeed sincerely seeking the position. He wants to be a police officer. The problem is that Mr. Adler's height is 5'6" and his weight is about 120 lbs. Indeed, the evidence is that at the time of the October, 1975 application his weight have have been only 108 lbs. (Evidence, pp. 30, 180). Mr. Adler was aware at the time of his application in 1975 that female persons were successful in meeting the height and weight requirements if they were at least 5'4" and 110 lbs., and he felt a male person should not be put to the more stringent standard of 5' 8" and 160 lbs. (Evidence, p. 31).

Mr. Adler's application to be a police officer was rejected because he did not meet the police force's minimum height and weight requirements.

I have canvassed the relevant law at length in my decision in Colfer v. Ottawa Board of Police Commissioners and Seguin, given together with this

decision. I shall not restate such law. The new legal issue presented in this case is, of course, specifically - if there are dual standards for male and female applicants, is there discrimination within the meaning of section 4(1)(a), of the Ontario Human Rights Code, as amended, because of sex when a male applicant meets the minimum size requirements for females but not the more onerous size requirements for males.

In reaching my decision, I wish to make several preliminary points very clear. First, there is no issue in the case before me as to discrimination on the basis of race. It is an entirely different question for consideration (and a matter not considered here) if and when the issue is that a minimum height requirement has a disproportionate effect upon any particular group whose ancestry results in their being, on the average, shorter than the general population, or, at least, than the caucasian sector of the general population. I make no comment upon that issue as it is not before me.

Second, I am not considering the question as to whether there should or should not be any minimum height and weight standards for male applicants to the Toronto police force, and whether such requirements are meaningful criteria or have the importance often given to them, in the recruitment process. As long as a police force wishes to have minimum size requirements for its officers, it can do so, provided of course, that there is no contravention of the law. The evidence seems to be clear that some police forces have no minimum size requirements, but that many do, with the requirements varying greatly.

It is clear from Chief Harold Adamson's testimony that the Toronto Police Force feels it is necessary to have minimum height and weight requirement (Evidence, pp. 150-152).

These requirements are based upon national averages and differentiate between female and male applicants. (Evidence, pp. 149, 150).

Third, given the differentiation, it is difficult to justify why a male applicant, as Mr. Adler, who fails to meet the minimum standard for males but can meet the minimum requirement for females, should be precluded from consideration. If the female applicant can perform the tasks of police officers, why can't the male applicant who is taller and heavier? In fact, he can argue, everything else being equal, that he should be given preference on the merits. Chief Adamson was pressed on this point.

> Q. Well then, what difference is there between a man who is 5'6" who applies? Can he not do the job that a 5'4" woman can do?
>
> A. Well, he'd be in exactly the same position, I suggest to you, as the smaller woman when it comes down to some certain circumstances whereby physical desterity is required. Now, for example, its been suggested to us that we hire small men for special assignments. Police officers, within this police force, the Metro police force, are not privy to that type of selection; they must do every police job, and one of the reasons that we have what is alleged to be an efficient police force is that the police officers on the job know their job and are moved from one spectrum of the force to the other so that they can gain that experience. So we have no place for specialists to the degree that we can give them off-street duties.

Q. Now, wait a second. You don't give the women just off-street duties, do you?

A. No, we don't. I've already said.

Q. My question is, what is the distinction between a woman who is performing normal police services and who is 5'6", for instance, and a man who is 5'6"? Is he less able to do that job that these 100 women are now doing?

A. No, he isn't.

Q. Well, what is the basis then for not hiring him and hiring a woman of the same size?

A. Again, we'll have to go back to what we consider a fair attitude with regard, the national average, size average for a male is 5'9 1/2". I've heard someone say 5'10", but my information is 5'9 1/2". We feel that we have gone the limit when we go to 5'8" for a requirement. Now, there's nothing to say that a man 5'6" couldn't do the job. The ability is certainly not set out by size. No one is questioning that, but we feel that because of the physical need that the man is better at a greater height, or more capable when it comes to physical difficulties.

Let's take crowd control situations, and again I could speak somewhat from experience. I can suggest to you that the larger officers are much more able to handle a physically violent circumstance. I'm not talking about a vocal dialogue here; I'm talking about a physically violent circumstance.

Q. I'm not. I just wanted to focus on these hundred women, police officers, some of the maybe 5'4".

A. Yes, some of them 5'6", whatever.

Q. I want you to tell me what is the basis for you distinguishing between hiring one of those 5'4" women who's going to do normal partol duties and not hiring a 5'4" man who applies.

A. The reason that the height is less for the female is again the national average is established at 5'4" and we feel that we would be discriminating against the females if we hired them. ---

Q. I see. Well, that's ---

A. Now, you've asked me the question, sir, let me finish. And we feel it is only fair that we go to this lower height to allow those people to apply. If you looked around this room, Mr. Sopinka, and look at the ladies herein, if we had a 5'8" height average, I'm sure we would be discriminating against all the women in this room. But with a 5'8" average for the males, we feel that we are not discriminating against the average Canadian male.

(Evidence, pp. 161 to 163)

There is not, of course, an answer to this question other than that the police force prefers to have taller and heavier officers but feels it must lessen its minimum requirements for female applicants.

However, the reasonableness of the minimum height and weight requirement is not in issue. What is in issue is simply whether in such a situation there is a contravention by the police force of The Ontario Human Rights Code, R.S.O. 1970 c. 318, as amended, specifically, s. 4(1)(a) thereof, which reads:

4.-(1) No person shall,

(a) refuse to refer or to recruit any person for employment;

...

...because of...sex...of such person or employee.

The Law

I shall not restate the relevant law, which I have attempted to canvass at length, in the Colfer decision.

There is some suggestion in considering American decisions that a finding of discrimination would be made in the instant situation. For example, in Hardy v. Stumpf[1], the California Court of Appeal stated:

> [9] Moreover, elimination of the height-weight limits [for females] must, under the same principle of equal treatment which requires it, eliminate the life requirement as to men. A factor upon which there is neither evidence nor discussion here is that of public confidence. The police arm functions not only to protect the public, but to instill in that public confidence that it is being protected - an increasingly difficult task in these days of rising crime rates.

Much as such an approach has some attractiveness, I do not think it is correct, at least with respect to the statute I am considering.

Although Mr. Adler may have been treated arbitrarily by the imposition of the minimum height and weight requirement, although those requirements may be largely the result of a view of a stereotype male police officer, and although he may have been treated unfairly in being subjected to standards more stringent than for female applicants, in my opinion the size standards of the Toronto Police Force do not contravene the Code.

Colfer dealt with a single, neutral standard which had a discriminatory result because of the disparate effect upon women. Mr. Adler was subjected to

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[1] (1974), 112 Calif. Rptr. 739.

a different, more stringent and onerous provision than female applicants simply because he was a male applicant. At first impression, this discrimination on the facts suggests unlawful discrimination. In most cases, a finding of discrimination would easily follow from the simple fact of different treatment because of sex, to the complainant's disadvantage.

However, on closer scrutiny, it is important to realize that female and male applicants to the Toronto police force, as groups, are treated equally.[1] No matter what the gender of an applicant, she or he is measured by reference to the statistical 'average' height and weight of the applicant's gender. Neither gender is put at a disadvantage vis-à-vis the other gender. (In fact, the height standard for males is slightly less than the national average for males). The result of the application of the minimum height and weight requirements of the Toronto police force is not to cause a disparate effect from the standpoint of gender insofar as entry to the police force is concerned. In fact, the utilization of a single size standard, no matter how relaxed it might be, would arguably always discriminate against women because of the difference in the statistical averages and the resulting disproportionate effect in exclusion to women through the application of a uniform standard. There is no prejudice to any applicant for the position of police constable because of that person's gender through the application of the minimum height and weight standards of the Toronto police force.

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[1] See also the October 31, 1978 Supreme Court of Canada decision, Bliss v. Attorney General of Canada, 78 C.L.L.C. 15, 081. A unanimous court held that statutory unemployment insurance benefits criteria which dealt with pregnant women differently from other applicants, was not in violation of the Canadian Bill of Rights. Ritchie, J. (at 15,084) said: "Any inequality between the sexes in this area is not created by legislation but by nature."

I find, therefore, that there is no discrimination against the Complainant "because of sex" within the meaning of s. 4(1)(a) of The Ontario Human Rights Code.

Dated at Toronto, this 12th day of January, 1979.

Peter A. Cumming
Chairman, Board of Inquiry

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DECISION AND ORDER IN RESPECT

OF COMPLAINT OF MS. ANN J. COLFER

Preliminary Point as to Nature of the Hearing

The Board of Inquiry in this matter dealt with three complaints. The first is in the matter of the complaint of Mr. Barry Adler of Willowdale, Ontario, alleging discrimination in employment by the Metropolitan Board of Commissioners of Police and Police Chief Harold Adamson. The second is in the matter of a complaint made by Ms. Carole McAdam of Ottawa, Ontario, alleging discrimination in employment because of her sex by the Ottawa Board of Commissioners of Police and Ottawa Police Chief Leo J. Seguin. The third complaint is in the matter of a complaint made by Ms. Ann J. Colfer, alleging discrimination in employment because of her sex by the Ottawa Board of Commissioners of Police and Ottawa Police Chief Leo J. Seguin.

On the application of Mr. Sopinka, with the agreement of counsel for the other parties, the complaint of Ms. McAdam was adjourned sine die. It was agreed to by counsel for all the parties that the other two complaints would be conjoined and dealt together in a single hearing.[1] Therefore, evidence was led

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[1] It is unusual to find a Board of Inquiry dealing with two complaints against separate respondents and alleging acts of discrimination which occurred at different points in time.

Because counsel agreed to joinder of the two complaints there was no issue as to whether the Board is permitted to do this. However, I had considered the relevant law in advance of the hearing in any event, as The Ontario Human Rights Code provides no statutory guidance in this matter. See in the matter of Morgan v. Toronto General Hospital, Oct. 14, 1977 at pp. 13-15. It would appear that, if the respondent can establish that he will be embarrassed in his defence by the fact that he has a co-respondent and/or the fact that more than one complaint will be heard, the Chairman would be well advised to continue the Board with just one respondent or one complaint.

with respect to both the complaint of Mr. Adler and the complaint of Ms. Colfer in the same hearing. Ms. Colfer's complaint alleges that she was discriminated against by being denied employment because of her sex in violation of paragraph 4(1) (a),(b), or (g) of The Ontario Human Rights Code, R.S.O. 1970, c. 318, as amended, being:

> 4(1) No person shall,
>
> (a) refuse to refer or to recruit any person for employment;
>
> (b) dismiss or refuse to employ or to continue to employ any person;
>
> ... or
>
> (g) discriminate against any employee with regard to any term or condition of employment
>
> ...
>
> because of...sex...of such person or employer.

The essence of Ms. Colfer's complaint is that she was refused employment as a police officer by the respondents because she is only 5'7 1/4" in height, and not at least 5'10" as required by the standard of the respondents. There is a suggestion in the Evidence, (p.43) that Ms. Colfer may have weighed 146 lbs. while the minimum weight standard was 160 lbs., at the time of her application as a police officer. However, it is clear from all the evidence that her failure to meet the minimum height standard was the critical problem. She alleges the 5'10" standard is discriminatory against female persons seeking employment as police officers with the Ottawa police force.

The complaint of Mr. Adler is dealt with in a separate decision. He also alleges a contravention of section 4(1)(a) of the Code by the respondent,

the Metropolitan Board of Commissioners of Police and Police Chief, Harold Adamson, on the basis of his sex. Mr. Adler's application for employment with the respondents was rejected because he is 5'6" and weighs 120 pounds. The height and weight requirements of the Metropolitan Toronto police force for female applicants are 5'4" and 110 pounds. Since Mr. Adler exceeds this requirement he believes that he is being discriminated against because of his sex in violation of section 4(1)(a) of The Ontario Human Rights Code, as amended.

The Evidence as to the Factual Situation Related to the Complaint

There was not substantial disagreement as to the factual situation in this hearing. There was disagreement as to the reasonable inference that could be made from certain conversations and there was also disagreement as to the intent of some of the persons in their dealings with Ms. Colfer.

Ms. Ann J. Colfer graduated from Acadia University in 1974 with a Bachelor of Arts degree, majoring in sociology. She then married Charles Crosby and set up a home in Ottawa. From September, 1974 to April, 1975 she was employed first as a ward clerk in a psychiatric ward, and later as an intake worker and receptionist, psychiatric clinic, in childrens' hospitals. From April, 1975 to September 1976 she was a private secretary to a physician in a children's hospital, then returned to university until May, 1977, and since then has been employed as a sales person. During the period from September, 1974 to August, 1977, Ms. Colfer also did extensive work as a volunteer worker in adult probation and parole services, doing such work as writing pre-sentence reports, acting as an assistant probation officer, and being a group leader to ten or twelve assistant probation officers.

On March 15, 1977, Ms. Colfer telephoned the Ottawa police force to enquire about applying for a position as a regular constable. She spoke with a Sergeant Amoyot who advised her as to the requirements (Evidence, p. 42). She says these included the prerequisite that she be at least 5'4" in height and 110 lbs. in weight. Ms. Colfer was 5'7 1/4" and 146 lbs. at the time (Evidence, p. 43).

She attended in person to apply on March 17, met Sergeant Amoyot, who was in charge of the application process, and later Inspector Fawcett, who was the officer commanding the recruitment training section (Evidence, p. 244). Both had been interviewing applicants for about five years (Evidence, pp. 246,247). Ms. Colfer was weighed and measured, and scored 87 on the test given to her. She said she was then questioned by Sergeant Amoyot:

> Q. Did it disturb him that you got 87?
>
> A. I think he was taken aback. We then sat down and chatted for a while. I got a little bit apprehensive about some of the questions. One of the questions I found difficult to understand, we were talking and he said, you know, there are many things you have to consider in applying, for instance, if you got pregnant and didn't know you were pregnant, how would you protect your unborn child if you were attacked, and that really got me. I didn't know. That was the main thrust of the thing.
>
> Q. Were there other questions that he asked you?
>
> A. The other questions were, why was I interested in becoming a police officer.

(Evidence, pp. 43,44)

She was then interviewed by Inspector Fawcett.

> A. Yes, he was. Well, after - the entire interview took approximately three hours, but after I would say about an hour and a half I was brought over to Inspector Fawcett, and again, he was courteous, but the tone of the questions were really rather negative. He opened it up by asking if my husband was aware that I had made the application, if I could return to Sergeant

> Amoyot, that was also brought up. You know, was I aware, was my husband aware, and what did my husband do, and, you know, did he know that I would be doing shift work - this type of thing. And Inspector Fawcett, you know, made a statement that he would not allow his wife to do this type of work. And then, you know, he gave me the example of a home being burglarized and - excuse me - gave me the option of would I not rather, if it were me being burglarized, would I not rather have a nice, big, strapping man come to the door rather than a 5'7" woman, and my reply was that if the woman had been trained it would make no difference.
>
> Eventually the inspector accepted my application, told me it was the first of its kind that he had accepted, and I made arrangements to come back the following day for finger-printing, which I did.

Q. When he said "the first of its kind" what did you understand him to mean by that?

A. I wasn't sure. I thought it might mean the first woman or the first married woman. I have a feeling it meant the first married woman. And a parting remark made to me, Inspector Fawcett, you know, gave me fair warning that although I might meet all the requirements I shouldn't hope too strongly to be hired because there was a long waiting list and that they only took the most qualified.

(Evidence, pp. 44,45)

Ms. Colfer took exception to what she regarded as "very personal questions relating to my marital status" (See her Complaint of Discrimination, filed as Exhibit #7 and also Evidence, p. 47). As a result, she wrote to Marion Dewar, assistant mayor of Ottawa, on April 6, alleging her application had been dealt with, and that she had been questioned, in a manner that was discriminatory (Evidence, p.46).

Ms. Colfer received a phone call from a Sergeant Rae on April 8, who then came to her home April 10, Easter Sunday, and interviewed her and her husband for about 15 minutes (Evidence, pp. 47-48). She said Sergeant Rae advised her

that her application was going before The Police Review Board within two weeks, which necessitated the interview on Easter Sunday. Ms. Colfer testified:

> "And I asked him did he foresee any problems in my application going through, and he said that he could foresee none at the moment. And that is where we left it."

(Evidence, p. 48)

Ms. Colfer says she then called Inspector Fawcett about April 18, and was told she would not be coming before the Review Board just yet "because [her] out-of-own references hadn't been cleared yet." (Evidence, p. 49). Ms. Colfer testified she had not given out-of-town references, and on checking, determined an in-town reference had not been contacted. (Evidence, p. 49)

Ms. Colfer then wrote Judge Peter J. MacDonald of the Ottawa Board of Commissioners of Police (Exhibit 8, and in the Evidence, pp. 50-53) on June 24, 1977, reciting the history of the matter and her concerns, and requesting permission to appear at the June 29 meeting of the Board.

It should be noted that this letter makes no reference to any problem about Ms. Colfer complying with any height requirement. It is evident, and I so find, that she was not aware of any such problem at that point in time.

She met with at least some members of the Ottawa Board of Commissioners of Police, and Police Chief Leo J. Seguin, on June 29.

Q. And what transpired?

A. The interview consisted, was held mainly between Judge MacDonald and myself where I asked him basically what had been mentioned in the letter, whether or not they discriminated against hiring women, and his reply was in the negative that they hired qualified police officers. I asked him when was the last time they had hired a qualified police officer that was a woman, and he declined to answer. And in the end Mayor Greenberg intervened and promised that there would be a report made which would be submitted to the Board and a copy forwarded to me on my allegations, and I had two newspapers there to corroborate that promise at the time.

Q. You mean there were newspaper people present?

A. Yes, I had the Journal and Citizen present, and it was reported in both of the papers that that promise had been made.

Q. Were you ever given a report? Did you ever receive a report?

A. I've received nothing.

Chief Thomas E. Welsh, appointed Chief of Police of the Ottawa police force May 1, 1978 upon the retirement of Chief Leo J. Seguin, testified. He was present at the meeting of the Board of Police Commissioners June 29. It is clear to me from his evidence that Ms. Colfer was not told at the meeting about the height requirement (Evidence, pp. 288 to 299).

Ms. Colfer has received no communication from the police about her application since the meeting of June 29, 1977.

Q. Have you ever received a formal response to you application?

A. No. I've received no communication from the Ottawa Police.

THE CHAIRMAN: You say that after June 29, 1977, there was no communication whatsoever?

THE WITNESS: No.

(Evidence, p. 55)

Ms. Colfer testified she was never advised as to a height requirement of 5'10", (Evidence, pp. 56,70) nor had she ever received a form letter (filed as Exhibit 4) which makes reference to this requirement, apparently sent to applicants for the position of police constable (Evidence, p. 56). She testified she did learn through another female applicant that that person had been told there was a 5'10" height requirement, and on phoning the Police Department in June or early July ascertained through an anonymous telephone call that an applicant had to be at least 5'10" and 160 lbs. (Evidence, pp. 57, 58, 246, 247).

Neither Sergeant Amoyot nor Inspector Fawcett, nor Sergeant Rae, gave evidence, nor was any reason given for their failure to do so (Evidence, p. 286,287).

Staff Superintendant Patrick Clarkin of the Ottawa police force gave evidence. He has been with the police force for over 25 years, and since January, 1972, has been the officer commanding the administration division, which includes the responsibility for recruitment (Evidence, p. 212). Staff Superintendant Clarkin testified that in the 1960's the height requirement for a police constable was lowered from 6' to 5'10" and has remained at that since, with no distinction being made between male and female applicants (Evidence, pp. 213-215).

Staff Superintendant Clarkin was on leave at the time of Ms. Colfer's application but he, or course, later became aware of it. He testified,

THE WITNESS: Yes. I was not aware of it, Mr. Chairman, until I think it was some newspaper publicity. Well, as I mentioned earlier, I had been away on annual leave and I returned to find the papers, you know, the front page, and photographs, and of course I then undertook to find out what had gone, what had happened, and at that time I questioned both Inspector Fawcett and Sergeant Amoyot as to what had happened, and I know there was a bit of confusion because some, it would be two months or two and a half months had elapsed since the actual date in question, and at that time of course we all realized that the application should not have been accepted. Thw woman, although meeting all other standards, she could not have appeared in front of a recruit board; she was not 5'10".

THE CHAIRMAN: So far as you're aware in investigating that application, she faltered on the height requirement pure and simple, and that was it?

THE WITNESS: Up to the time that the report went out to the field investigator, yes. But I don't have the field report.

THE CHAIRMAN: She never got into the 200% group, as you call it?

THE WITNESS: No.

THE CHAIRMAN: That goes to the recruit board - that's what you call it, the recruit board?

THE WITNESS: Yes, sir.

THE CHAIRMAN: So, so far as you know, it was simply the height requirement?

THE WITNESS: It was the height requirement entirely. You know, if Chief Seguin, when this thing hit the papers, in my office he was saying, "Boy, I wish we could get a qualified, 5'10" woman to come in and apply". Frankly, when the heat was on - but we just couldn't get anybody.

(Evidence, pp- 220,221).

There are two issues that arise as to the factual evidence. The first is whether the questions put to Ms. Colfer by the various officers in themselves

constituted one or more acts of discrimination. Ms. Colfer certaintly felt that she was not wanted as a police constable because she was a female person, or, at the least, because she was married. She believed that her interviewers were more interested in rejecting her application for these reasons, than in determining her qualifications on the merits and considering her application simply in that light. In my view, considering the totality of her evidence, I think that Ms. Colfer was perhaps too sensitive to the specific questions put to her, and to the manner in which they were put. I would not be prepared to find discrimination simply on the basis of the nature of the questioning throughout the interviews.

However, I wish to make clear that I accept Ms. Colfer's evidence as to the questions put to her throughout the interview. Indeed, this was not really disputed by the witnesses on behalf of the Ottawa police force.

What is in dispute is the inference to be made from the nature of the questioning. As I have said, I would not find the questions put to Ms. Colfer by Sergeants Amoyot and Rae, and Inspector Fawcett, discriminatory in themselves, considering the totality of the evidence before the Board of Inquiry.

However, the fact that Ms. Colfer made the inferences she did from the interviewing process is understandable given the fact that her application was not proceeded with beyond the initial interviewing process, that is, it did not go forward to the Review Board, and she was never told during her recruitment process about the 5'10" standard.

The second factual issue is the question of the height and weight standards. I accept Ms. Colfer's evidence that she did not know anything about the 5'10"

and 160 lbs. standards until after she appeared at the Board of Commissioners meeting June 29 and she made the anonymous telephone call. Indeed, her evidence on this point was also not disputed. The question then is - was the more stringent standard truly in effect on March 25 when she first enquired about becoming a regular police constable. It strains belief to think that Sergeant Amoyot and Inspector Fawcett, in charge of recruitment for some five years, would not know, or at the least be uncertain, as to the height and weight standard. Nothing was ever communicated to Ms. Colfer during her recruitment process by the police as to the 5'10" and 160 lbs. standards. One is left on the evidence with having to make one of two conclusions. Either the standards were fabricated as a hoped-for-excuse that would be accepted by Ms. Colfer in the rejection of her application or the police very stupidly and sloppily dealt with her application in either not knowing what their own standards were, or knowing them but for some unknown reason not communicating those standards to the applicant.

The effect of Staff Superintendant Clarkin's testimony is that the latter conclusion is offered as the proper one.

> Q. Do you have any information as to why in that interview they never said to Ms. Colfer that there was a height requirement of 5'10"?
>
> A. Well, I don't know that they did not.
>
> Q. Well, the evidence is that they didn't. Are they being called to give evidence? Are they here?
>
> A. No, they are not here.
>
> Q. Well, the evidence we have is that at no time, including the attendance before the Board of Police Commissioners, was she ever told there was a height requirement of 5'10". You heard that evidence?
>
> A. I think I recall in evidence that she made a telephone inquiry and was given the information.

Q. Yes, but not until she had made an anonymous telephone call, she was then told there was a requirement of 5'10". This was after all the publicity surrounding Ms. McAdam's application. Do you have any explanation as to why Sergeant Amoyot or Inspector Fawcett mentioned to her when they took her height and found it 5'71/4", told her that she would be disqualified when they had been interviewing applicants since 1972?

A. I just want to be quite precise. Can you give me that question again, please?

Q. Do you have any explanation as to why, having measured Ms. Colfer, and found she was 5'71/4", why they didn't tell her that she was disqualified because the requirement for the City of Ottawa police department was 5'10"?

A. No, I don't. They made a mistake. They should have if they didn't.

Q. They made a mistake?

A. Yes, sir, they made a mistake as I said on direct. There was no way around it. We should not have accepted that application of Ms. Colfer and put her through this. It was made, I think, in an honest attempt to put on file an application which might some day bear fruit, but it should not have been done, and we bombed.

There is no way out of it, Mr. Sopinka. We made a mistake.

Q. Well, of course, we're not going to hear from Sergeant Amoyot and Inspector Fawcett that they made a mistake. You said they made a mistake. Isn't that so?

A. We made a mistake. I'm not attaching the blame to them in retrospect. It should have been my responsibility to emphasize that no one under the height of 5'10" would be given an application form.

...

Q. Why did you think her application shouldn't have been taken?

A. Because she was not 5'10".

Q. So you spotted it immediately, did you?

A. When I saw it, yes.

Q. No doubt you informed the Commissioners when you knew she was coming for an interview?

A. I did not know she was coming for an interview.

Q. You were never told there was going to be a hearing before the Police Commission to find out why she hadn't been hired? You hadn't heard that she'd been alleging discrimination?

A. I was never involed in that particular level when she was in correspondence with the Board of Police Commissioners. I'm not - I'm a Staff Superintendent. I was not directly involved in her appeal to the Commission. I was not aware of it until I heard she had attended at a meeting.

Q. So what you're telling us is you looked at it as a recruitment officer and immediately spotted she was disqualified by this height requirement?

A. Yes.

Q. Notwithstanding that, she attended a hearing of the Commissioners and was never told that that was the reason why she wasn't hired, but was told there would be an investigation and a report; isn't that the situation?

A. I'm sorry, sir, I was not at that meeting.

...

Q. So you didn't - you know that there was a letter written on June 24th which is an exhibit, to the Chairman of the Commission?

A. I have since learned of the letter, but at the time the letter came in, before her appearance at the Board of Commissioners of Police, I did not know she had written that.

Q. So they didn't even ask you when they were going to hear her to deal with her complaint that she was discriminated on the basis of sex; they didn't even ask you as the man in charge of recruitment why she hadn't been hired?

A. I was absent on annual leave when the actual episode occurred. I turned over to my superior, to the Chief's office, her file so that it would be accessible to the Board at that time.

Q. Oh, the Chief had the file, did he?

A. I turned it over, yes, sir.

Q. And that would contain her application that showed she was 5'7 1/4"?

A. Her height and weight is on the application.

Q. So presumably that was before the Board of Police Commissions when they heard her?

A. The Chief appears at all Board meetings, and I'm going on an assumption here. I imagine he would table the document which I'm merely assuming.

(Evidence, pp. 246, to 249, 253,254)

I am prepared to accept his testimony on this point. Therefore, I find on the evidence that the standards of 5'10" and 160 lbs. were in effect in 1977 during the time Ms. Colfer sought employment. I am prepared to accept Staff Superintendent Clarkin's testimony on this point, much as I find it difficult to understand both the confusion as to standards that prevailed in the recruitment process, and also the extreme discourtesy to Ms. Colfer in never even communicating to her that she did not meet the standard as a recruit prospect.

The main issue relates to the fact of a single standard of 5'10" and 160 lbs. applied to both male and female applicants for a regular police constable. A good deal of evidence was led on this point.

The view of the Ottawa police force is that a height of at least 5'10" is essential for all police constables. Although that police force does not employ physical strength and similar-type tests in assessing a recruit's qualifications, the view, based simply upon the personal experience of the senior police administrators, is that a big person is perceived as having the advantage of greater ability to control a situation requiring police intervention. Staff Superintendant Clarkin testified:

A. It's very manifest. You see out in the street. You can't carry around a statement that you're an expert in karate, that you can do the mile in so many minutes, that you have hand strength. Your apparent ability to control a situation is important. We can't resort to wrestling matches every time there is, a policeman has to assert his dominance in a situation. If a police officer, merely by standing erect, can apparently demonstrate to the other individual that at least a calm discussion of the various positions in the problem would be better than fisticuffs or some wrestling match, in our mind that is a better way to do it. The only way a small man can prove that he is a fighter is by fighting. I would much rather have a big man to keep the streets safe without violence.

...

THE WITNESS: When all other things are equal, you have a police officer of intelligence, aptitude and attitude, the bigger the police officer, the taller the police officer, the more versatile he or she is. It is my studied experience over 25 years as a police officer, the height obviates violence in many cases in confrontational situations, the height of the police officer quite often imparts a tranquillity, as was mentioned here yesterday. You don't have to fight.

(Evidence, pp. 257, 227)

Chief Thomas E. Welsh testified as well as to his belief in the advantage of height:

Q. How big an advantage do you find height in dealing with crowd control and demonstrations?

A. Well, I think, as the previous witness has stated, it is very important. You must be able to see over the crowd and of course usually height, weight goes with that, and you need this kind of thing to be able to handle crowd control, particularly in Ottawa where we have it's not an everyday occurrence, Mr. Chairman, but we have many demonstrations, as you can appreciate. We have the Embassies in Ottawa, and we do have many demonstrations, some small, some large, some very large, some very violent, and this is the kind of person that we need when we get down to these demonstrations, to be able to control these crowds.

> We also, being in the capital of Canada, of course many parades, and these are rather nice things to handle rather than violent situations, but here again I think that over the years we have built up a bit of expertise in this area. We seem to be able to handle the situation in most cases with what we have.
>
> Q. What about directing traffic?
>
> A. Directing traffic, well, an interesting observation, a couple of years ago I was at Nassau.
>
> Q. Nassau in the Bahamas?
>
> A. Nassau in the Bahamas, and somebody was directing traffic. He was standing in a box; he was a short man. We, here in Ottawa we've had, some years ago we had one of our policewomen, the ones that were referred to by Staff Clarkin, was directing traffic, and she was badly injured. She is no longer on the job, and I understand that some of the evidence was such that the driver simply couldn't see her. She was average height of a female, 5'4", and I think it is very important that when directing traffic that you be seen.

(Evidence, pp. 280,281)

Evidence from Studies as to the Merits of a Height and Weight Requirement

Neither the Ottawa nor the Toronto police forces have done empirical studies on the merits of any particular height requirement for police officers, whether they be male or female. The Ottawa standard of 5'10" effectively virtually eliminates women as police constables. The Ottawa police force has only once in its history through its recruitment process accepted a female applicant as a regular police constable. (Evidence, p. 224) The other five female constables presently in the total force of about 580 constables obtained their employment when their original task for which they were intiially employed, as "meter maids", (Evidence. p. 224) was terminated. Therefore, of the six female constables, only one is 5'10" or better.

The Metropolitan Toronto police force has about 100 female constables in a total police personnel force of 5,400 persons (Evidence, p. 152). The require-

ments for some years, based on national averages for male applicants include that male applicants be at least 5'8" in height and 160 lbs. in weight, and for female applicants, that they be at least 5'4" in height and 110 lbs. in weight (Evidence, pp. 149 to 151, 156).

Chief Harold Adamson testified as to the experience of the Metropolitan Toronto police force:

> Q. Now, Chief, I would like you to comment on the evidence given by Dr. Sichel, if you can, and give us your opinion as to, based on the experience in Metropolitan Toronto, if you think it is appropriate, that there should be a differentiation and the capabilities.
>
> A. I'll try and recall her evidence as best I can. I agree in many points that the doctor has made with regard to the ability of male and female police officers. I think that there is no difference in ability. We find that our experiences with our female officers, our female constables, is that they are just as capable in many instances, and in some instances more so. They have as many talents. They do just as well in Police College. They are accepted well by the public and they do a very fine job.
>
> Q. Are they assigned to any particular type of work more than any others?
>
> A. No. At one time within the force there were assigned mainly to juvenile work and morality work. A few years ago I changed the rules to allow them to be on patrol, and they are on patrol now. At one time they were not armed; they are now armed and perform the same patrol function as the males. To some extent I find that there would be some hesitancy on my part - I'm going now to my experience - to assign a number of them at one give time to patrol areas of downtown Toronto, either by themselves or in the company with another female.
>
> Q. Why is that?
>
> A. Only by reason of their physical size and stature. I have had the opportunity of attending many demonstrations, both non-violent, at which I had police officers female with me who were able to do a good job, but when it come to actual physical strength they were not understandably comparable to that of the male police officer.

Q. Is physical strength an important element in you opinion?

A. On occasion it is almost vital.

(Evidence, pp. 153,154)

Q. In fact, you were quite complimentary about the work of your hundred females.

A. Well, you know, certainly if I hadn't made it clear, let me do so, that they are very competent and very qualified, and do an excellent job. Now, I don't know how much more I can emphasize it.

Q. Now, you pioneered the move to have them on patrol?

A. Well, pioneered is a rather - there isn't any pioneering; it's done in other cities. I decided that we would try the experiment. It did work.

Q. Then presumably those hundred came in under a requirement that permitted them to be hired if they met the height requirement of 5'4"?

A. That's true.

Q. And they are performing the same kind of jobs as the male police officers?

A. Well, here again, let me - we have to put some qualifications. Under normal patrol practices, yes. They can answer the calls, they can do all the jobs just as well or better than the men. No question about that, except when it comes to some areas where there certainly is some need for strong, physical presence, and then I suggest to you that it is no competition between them and the men. But that isn't - that's a biological difference.

Q. Right then. But that doesn't prevent you from hiring a woman that is 5'4"?

A. No.

(Evidence, pp. 160,161)

I find on the evidence that the respondents did not have the intention, or motive, of discrimination toward the Complainant because of her sex. However, the effect of the Ottawa police force's employment policy was to deny the Complainant recruitment as one of its police officers. The effect of the application of the minimum height standard of 5'10" is to deny virtually all women employment as police officers. On the statistical evidence less than 5% of women are 5'10" or taller, whereas, a near majority of men are of at least this height. The height standard discriminates, at least in the factual sense, against women. This result is clearly known to the Ottawa police force (Evidence, p. 221). But there is no malicious intention directed toward applicants. The recruitment administrators of the Ottawa police force honestly prefer applicants of at least the minimum size and weight of 5'10" and 160 lbs. I infer from the reasons given in the evidence for this preference that women applicants are truly not desired by the police force, but this is not the reason for the minimum requirements. That is, the minimum requirements are not a subterfuge to exclude women.

A critical issue of law must then be considered. If there is no intention to discriminate on the basis of sex behind the minimum height standard required of applicants to the police force, is there discrimination within the meaning of The Ontario Human Rights Code, simply because the Ottawa police force uses the minimum height standard? If there is no intention to discriminate against women, but the effect of the policy and rules in application is to exclude women from employment, is there discrimination within the meaning of s. 4(1)(a),(b) or (g) of The Ontario Human Rights Code?

Are Height and Weight Requirements Discriminatory?

The critical issue is whether the height and weight requirements violate s. 4(1)(a), (b) or (g) of The Ontario Human Rights Code on the basis of sex.

As will be discussed at length, in my opinion, to succeed, the evidence the Complainant leads must fulfill certain requirements. First, the complainant must establish a prima facie case of discrimination, that is, that she as a member of a group protected by the Code has been discriminated against by reason of the respondent's height and weight restrictions. Second, there is no need to show that the respondent's height and weight requirements have been or are intentionally discriminatory. Third, if the result of their application has been discriminatory against a protected group, (and the complainant may use charts, statistics, expert witnesses, etc. to show this) then the onus falls on the respondent to establish that the height and weight requirements are reasonably necessary to the safe and efficient operation of the police force to justify the requirements' discriminatory effect.

I do not, for a moment, underestimate the importance of this case for the public or for the police forces in Ontario. All of society, sooner or later, comes into contact with the police. It is fair to say that the implications of this decision may affect a large number of people. This is an issue raised for the first time before a Board of Inquiry in Ontario, and Canada.[1] It is important to canvass thoroughly the issue raised in this case, and to consider at length the relevant law. I emphasize that the issue before this Inquiry is,

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[1]Except for Roberta R. Ryan v. Chief of Police, Police Committee, Town of North Sidney, discussed infra.

of course, not whether Ms. Ann Colfer should be allowed to become a police constable with the Ottawa police force, but whether the respondents, through the imposition of the minimum height and weight standards, are guilty of a breach of The Ontario Human Rights Code through discrimination because of sex as prohibited by s. 4(1)(a), (b) or (g) of the Code.

I am aware, of course, that there are strong views being asserted in Ontario as to what should be the requirements to be a police officer.

In a 1974 report to the Solicitor-General John Yaremko, Task Force on Policing in Ontario, a number of proposals were set forth:

> Women
>
> We feel it essential that women find a larger role within Ontario Police forces. Our view is more than an echo of the egalitarian sentiments of the day. There is no evidence to suggest that women are incapable of performing the police role in virtually all its aspects. Indeed, there is considerable evidence to suggest that women are more effective than men in family crisis situations or incidents involving violence. Yet with few exceptions, police women in Ontario are relegated to juvenile or matron duties.
>
> Policing in Ontario has been a male preserve. We can imagine nothing which would more symbolize our intent to make police forces representative of and sensitive to the communities they serve than a major increase in the number of police women in Ontario.
>
> We therefore recommend that:
>
> Role 4.6 - Ontario police forces be encouraged by the Ministry of the Solicitor-General and the Ontario Police Commission to recruit female police officers for specialized and general duties, with the opportunity for advancement equal to their male counterparts, and that there be no discrimination according to sex in recruiting or promotional opportunities. 1

1. At p.35.

Ethno-Cultural Mix

Ontario is a province with a great diversity of cultures. The Canadian concept of a cultural mosaic supports the need to deal with each on its own terms and in its own ways in the context of Canadian law. Our recommendation on the need for modern policing to maintain open and easy communication channels between police and community requires that ethno-cultural composition of a police force be a reflection of that in the community. This is more than a matter of language. It requires that a police force deal with each distinct sub-group in the community within the framework of the distinct values and customs of that sub-group.

We therefore recommend that:

> Role 4.1 - Each police force adopt a deliberate recruiting strategy to bring the ethno-cultural composition of the force in line with that of the community. 1

The same report, in the section entitled Ontario Police Personnel, notes that the Police Act by virtue of its general regulations lists a number of requirements for police officers. One of these at the time of the report[2] was that a Constable must be at least 5'8" in height.

> On occasion, the police officer is required to use physical presence or force to protect the citizen and himself. The Task Force recognizes that physical size is important, but not the only determinant of an officer's ability to perform in these situations. Self-defence and holding techniques could qualify individuals of smaller stature. We therefore recommend that:
>
> Pers. 1.4 - Individuals of lesser stature than 5'8" may not be precluded from joining Ontario police forces. 3

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1. At p.33.
2. This requirement was dropped by an amendment to the Regulations of Dec. 18, 1974; O. Reg. 970/74.
3. At p.85.

There is a conspicious absence of reference to female police officers in the Police Act regulations. For example, the wording of general regulations No.32 (previously quoted) is such that it seems not to apply to female police officers. There is sufficient evidence now available from experience in Canada and the U.S., and particularly from two major forces in Ontario, that female police officers can perform police duties comparable to their male counterparts. In Ontario, practices and regulations regarding female police officers vary considerably. One major police force assigns female police officers to special duties and prohibits them from carrying firearms, whereas another major force assigns female police officers to regular duty without restriction. The Task Force recognizes that there are conflicting viewpoints on the acceptability of women in police forces. Regardless of these varying viewpoints, we recommend:

> Pers.1.8 - Ontario police forces recruit police officers both male and female, with equal opportunity for advancement for all members. [1]

I have also reviewed as well Walter Pitman's report submitted to the Council of Metropolitan Toronto by the Task Force on Human Relations, entitled Now is Not Too Late.

Two recommendations in the Pitman report are of particular interest. Recommendation 4.9 states:

> That Metro Council recommend to the Metro Toronto Police Commission and the Metro Toronto Police Force that greater effort be made to attract as applicants members of the visible minorities.

The report turns its mind to the height and weight requirements. It says:

> In addition, the physical requirements of height and weight which to a large extent keep certain minorities from being considered for employment as policemen, should be relaxed in order to raise the percentage of officers from these groups. Policing is now a profes-

1. At p.86.

> sion within which individuals can play a number of specialized roles. Some individuals may lack the capacity to control crowds or apprehend individuals due to their small stature. However, physical size should not be used as an inflexible restriction for applicants. If, indeed, the policeman is becoming increasing involved in interpersonal relationships and social service, this fact should be taken into account when physical size appears to be a prohibiting factor in hiring more policemen from the ranks of the visible minority groups. Since this would involve an amendment to the Police Act the appropriate representation should be made to the Ontario government.
>
> Recommendation 4.10 states:
>
> That Metro Council recommend to the government of Ontario that exceptions to the height and weight requirements for employment on the police force be set aside in order to accommodate members of visible minorities whose physical size does not normally meet these requirements.

Irrespective of the merits of the various suggestions in the referred to reports, the question before this Inquiry with respect to both the Colfer and Adler complaints is, of course, whether or not the Respondents, in imposing their minimum size requirements, have contravened the Code.

We shall now consider the relevant law to this issue.

The Law

The Interpretation of Canadian Human Rights' Legislation

There is a clear consensus in Boards of Inquiry decisions, not only in Ontario but across Canada, that human rights legislation is remedial legislation to be interpreted quite differently from criminal law statutes. Boards of Inquiry have held that human rights legislation must be interpreted fairly and liberally so as to ensure the attainment of the goals indicated in the statutory provisions.

In a recent Board of Inquiry, Robert Heerspink v. The Insurance Corporation of British Columbia,[1] Chairman Leon Getz discussed at length the proper interpretative approach to human rights legislation. In the Heerspink complaint, the respondent cancelled a policy of fire insurance it held on the complainant's property. No reason was given for the cancellation, but the complainant alleged that it was because he had been charged with possession of and trafficking in marijuana. He allged this violated section 3 of the British Columbia Human Rights Code, which makes discrimination in the provision of services unlawful

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[1] March 16, 1977.

Decision and Order

The issue facing the Chairman was whether the effect of the "reasonable cause" privision in section 3 was to derogate from the common law of contractual relationships. The Chairman concluded that the statute worked a fundamental change in the common law.

> "If there is any doubt about this, that doubt should in my opinion, be resolved in favour of the Code.
>
> It must be borne in mind that the Human Rights Code is in some respects legislation of a rather special character. Speaking of analogous legislation in England, the Race Relations Act of 1965 and 1968, Lord Morris recently observed that they introduced into the law of that country 'a new and guiding principle of fundamental and far-reaching importance'. [Charter v. Race Relations Board, [1973] 1 All E.R. 512, 518 (H.C.)]. It seems to me that the Code, equally, introduced into the law of British Columbia, a similar new and guiding principle of fundamental and far-reaching importance. It is of the very nature of the issues with which it deals that it should be expressed in words of general and far-reaching significance. It is concerned not with the specific and isolated abuse that was so characteristic of the concerns of legislation enacted in an earlier era, an era in which 'legislatures interfered as little as possible with the fundamental traditions of society, and the courts were but carrying out the legislative purpose when they invoked this presumption [against interference with common law rights] in order to confine the operation of an Act within narrow bounds.' [Willis, Statutory Interpretation in a Nutshell, (1938) 26 Can. Bar Rev. 1, 20]. It is concerned, rather, with broad categories of behaviour, and requires an interpretive approach that is consistent with its character. In my view, it demands that 'fair, large and liberal construction and interpretation as best ensures the attainment of its objects' that is called for by section 8 of the Interpretation Act, S.B.C. 1974, c.42." [1] At pp.13-14

1. An appeal to the Supreme Court of British Columbia before the Honourable Mr. Justice Meredith upheld the Board of Inquiry decision.

In Re Attorney-General for Alberta v. Gares,[1] the court was called upon to resolve an ambiguity in the term "employ" in section 5 of Alberta's Individual Rights Protection Act. The complaint was an allegation that female employees were being paid less than their male counterparts. Justice McDonald, who has heard a number of appeals with respect to human rights cases in that province, cited the preamble of the Individual Rights Protection Act which is similar to the one found in the Ontario Human Rights Code and concluded:

> "From the preamble it becomes clear that the prohibition in section 5 was designed to protect the 'equal...rights of all persons...without regard to...sex...'. This leads me to the conclusion that the word 'employ' in section 5(1), if ambiguous, should be given a liberal construction as best ensures the attainment of the object of the statute."[2]

The Ontario Human Rights Code includes within its Preamble and section 9 the following precepts:

> Whereas recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world and is in accord with the Universal Declaration of Human Rights as proclaimed by the United Nations;
>
> And Whereas it is public policy in Ontario that every person is free and equal in dignity and rights without regard to race, creed, colour, sex, marital status, nationality, ancestry or place of origin;
>
> . . .
>
> S. 9 . . . The Commission shall
>
> (a) forward the principle that every person is free and equal in dignity and rights without regard to race, creed, colour, age, sex, marital status, nationality, ancestry or place of origin;

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[1] 67 D.L.R. (3d.), 635.

[2] At p. 687.

In a recent Saskatchewan case, Barry Singer v. William Iwasyk and Pennywise Foods Ltd.,[1] the complainant alleged that the respondent was displaying a sign which indicated discrimination against a class of persons because of their colour in contravention of section 4(1) of the Fair Accommodation Practices Act, R.S.S., 1965, c. 379, as amended. The sign was a caricature of a small, dark skinned person wearing a chef's hat and a grass skirt and bearing the words "Sambo's Pepperpot". The sign was located at a drive-in restaurant called "Sambo's Pepperpot". Advertisements of the restaurant, including matchbooks and automobile stickers, depicted the same caricature in association with the words: "Jez aint none better". The Chairman, Judge Tillie Taylor, had the task of deciding whether the caricature indicated discrimination against black people, in contravention of section 4(1).

In her decision, the Chairman concluded:

> "The meaning of section 4(1) must be arrived at in the context of the province's Human Rights legislation as a whole. The Saskatchewan Human Rights Commission Act, 1972, S.S., .108, as amended, places upon the Saskatchewan Human Rights Commission the duty to follow the principle that every person is free and equal in dignity and rights without regard to race, colour, etc. In keeping with the provisions of The Interpretation Act, of the Province of Saskatchewan, to the effect that, as is stated in section 11 thereof:
>
> > 'every Act shall be deemed remedial and shall receive such fair, large and liberal construction, and interpretation as best ensures the attainment of the object of the Act,'
>
> the Commission is bound to approach the interpretation of section 4(1) of the Fair Accommodation Practices Act with the purpose of protecting the dignity and rights of black and coloured persons and any others affected by the Sambo caricature ..."[2]

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[1] November 5, 1976.

[2] At pp. 4-5.

In her decision, Judge Taylor said that the "Commission could have taken the position that this part of the section is too weak and uncertain and therefore unenforceable".[1] However, she concluded:

> "We have decided that since our legislation is remedial, designed to secure the rights of our citizens to non-discriminatory treatment, it is our obligation to adopt a liberal interpretation of the law in order to fulfill the legislative objective as set forth in section 7(a) of the Saskatchewan Human Rights Commission Act, namely to:
>
> '(a) forward the principle that every person is free and equal in dignity and rights without regard to race, creed, colour, religion, sex, nationality, ancestry or place of origin.'"[2]

One of the very first decisions under The Ontario Human Rights Code was by Judge J.C. Anderson[3] who formed a Board of Inquiry which heard a race discrimination complaint of Alvin Ladd and two others against Mitchell's Bay Sportsman Camp. The complainants alleged that they were discriminated against because of their race by being denied rental of certain of the respondent's facilities. Although the complainants and the respondent reached a settlement during the progress of the Inquiry, Judge Anderson had this to say about the Code:

> "The preamble of the Ontario Human Rights Code states that recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world and that public policy in Ontario is that

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[1] At p. 7.

[2] At p. 7. The decision was reversed on other grounds by Justice Hughes of the Court of Queen's Bench, October 5, 1977.

[3] August 15, 1963.

> every person is free and equal in dignity and rights without regard to race, creed, colour, nationality, ancestry or place of origin. And the aim of the Code is to create on the community level a climate of understanding and mutual respect in which all people of whatever racial, religious or cultural background are made to feel that they are all equal in dignity and rights."[1]

Judge Anderson then reviewed the terms of settlement reached and concluded that they were satisfactory in that they reflected "the letter and the spirit of the legislation".

A few years later, similar sentiments were echoed in the case of Nora Gordon v. Bessie Papadropoulos.[2] Chairman Dean R. St. J. Macdonald said this about the Ontario Human Rights Code:

> "The Code from the outset was intended to be something more than a mere declaration of desirable values enforcible solely through the processes of education and persuasion. While the Code may not represent criminal law strictly considered, enforcible by the imposition of heavy penalties, it nevertheless reflects governmental belief that 'artificial barriers denying equality of opportunity...can be breached and torn down.'
>
> (Debates of the Legislature of Ontario, December 14, 1961, at p. 419) . . .
>
> The Commission has an important institutional duty to bolster respect for the principle of equality, to reaffirm expressly and powerfully that this principle has a community status superior to that of a pious slogan, and to publicize the fact that uncompromising condemnation of racial discrimination is a part of the public morality of the province. This duty is most effectively discharged by the Commission's adoption from time to time of a posture of vigorous enforcement."[3]

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[1] At pp. 2-3.

[2] May 31, 1968.

[3] At pp. 8-9.

In Allen Walls v. Louis Lougheed,[1] a Board of Inquiry chaired by Professor Horace Krever, the complainant alleged discrimination in the rental of an apartment because of his race and colour. Chairman Krever said:

> "The purpose of the Code is to bring about a state of affairs in which the recognition that every person is free and equal in dignity and rights irrespective of race or colour would find a realization in the conduct of residents of this Province. Effect could not be given to this purpose if a narrow and restrictive interpretation were placed on the language of section 3(a). In coming to this conclusion, I am mindful of the provisions of section 10 of the Interpretation Act, R.S.O. 1960, c. 191, which reads as follows:
>
> > 'Every Act shall be deemed to be remedial...and shall accordingly receive such fair, large and liberally construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.' "

Later decisions confirm the validity of this interpretative approach to human rights legislation and consistently reject narrowing the scope of the interpretation of The Ontario Human Rights Code.

Chairman Edward Ratushny, in Roland Cooper v. Belmont Property Management and Others,[2] which involved an allegation of race and colour discrimination in employment, cited the same provision, being s. 10 of The Interpretation Act R.S.O., 1970, c. 225, in order to give the interpretation of the word "marital status", a "fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit".

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[1] August 21, 1968.

[2] July 27, 1973, at p. 4.

Having to choose between a restrictive and a liberal interpretation, Chairman Ratushny adopted the view that a restrictive interpretation approach should be disregarded in the case of modern statutory offences which pertain to "a special type of social purpose statute". He concluded that The Ontario Human Rights Code "is obviously such a statute".[1]

Chairman Sidney Lederman also adopted the view that The Ontario Human Rights Code is "a humanitarian remedial statute which fulfills a public purpose" in the complaint of Betty-Anne Shack v. London Driv-Ur-Self Limited and Others[2]. In that case, the complainant was alleging sex discrimination in the denial of employment. The respondent maintained that sex was a bona fide occupational qualification and Chairman Lederman ruled that any exception to the Code was intended to be strictly construed and that the burden to prove this exception would lie on the person who was asserting it. Chairman Lederman justified this approach by taking cognizance of section 10 of The Interpretation Act which provides that, as we have already seen, every Act is to be deemed remedial and is to receive a fair, large and liberal construction and interpretation.

On September 22, 1975, Chairman Sidney Lederman gave a decision with respect to the complaint by Mr. Kerry Segrave that he was refused recruitment, training and employment by Zellers Limited because of his sex and marital status. Chairman Lederman noted the philosophy of equality for all people expressed in the Code and said "the important principle underlying The Ontario Human Rights Code is the recognition that people are individuals and that there are no stereotypes."[3]

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[1] At. p. 5.
[2] June 7, 1974.
[3] At p. 13.

More recently, the same Chairman in a decision dated May 19, 1977, in the complaint of Brett Bannerman on behalf of Debbie Bazso alleging discrimination in the denial of "services and facilities" because of her sex by the Ontario Rural Softball Association, had to decide whether the respondent provided services and facilities within section 3 of the Human Rights Code. Chairman Lederman again endorsed a liberal interpretation of the legislation and referred to section 10 of The Interpretation Act.[1]

Finally, in the August 15, 1978 Ontario Court of Appeal decision with respect to the appeal of a decision in a Board of Inquiry chaired by Professor Mary Eberts, Cummings v. Ontario Minor Hockey Association,[2] Chief Justice Evans said:

> "...while I agree that the language in a statutory code of this nature should be given a wide and liberal interpretation, I do so with the caveat that the language should not be distorted to arrive at a conclusion which will tend to defeat the purpose for which the Ontario Human Rights Code was presumably enacted."[3]

American Judicial Interpretation of Civil Rights Legislation

Like Canadian Boards of Inquiry, American courts and human rights' tribunals have consistently chosen to give full scope to the philosophy and concepts which underlie the Civil Rights Act of 1964. Title VII of the Civil Rights

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[1] At p. 13.

[2] Dated Oct. 31, 1977. See also the Court of Appeal decision of the same date in Bannerman v. Ontario Rural Softball Association, at p. 2. Both decisions dealt with factual situations of girls playing on boy's teams, and turned on the issue of the interpretation of s. 2(1) of the Code.

[3] At. p. 4.

Act of 1964[1] provides that:

> It shall be an unlawful employment practice for an employer
> (1) to fail or to refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges or employment, because of such individual's ... sex ...; or
> (2) to limit, segregate or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's... sex ...

In Samuel Culpepper v. Reynolds Metal Company[2], the complainant was a black employee who alleged racial discrimination in the employment practices of the respondent. Circuit Judge Tuttle said:

> "Title VII of the 1964 Civil Rights Acts provides us with a clear mandate from Congress that no longer will the United States tolerate this form of discrimination. It is, therefore, the duty of the courts to make sure that the Act works, and the intent of Congress is not hampered by a combination of a strict construction of the statute and the battle with semantic spirit. This court has held many times that Title VII should receive a liberal construction ...[3]

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[1] 42 U.S.C. No. 2000 E, section 703(a).

[2] 412F 2nd. 888, a decision of the United States Court of Appeal, 5th Circuit, January 8th, 1970.

[3] At. p 891.

Judge Tuttle was of the view that the Civil Rights Act of 1964 should be considered "a humane and remedial statute" and should receive "a generous interpretation".[1]

In the case of Rogers et al v. Equal Employment Opportunity Commission[2], the same court heard an employer's petition to set aside or modify the demands of the Equal Employment Opportunities Commission pertaining to alleged unfair employment practices. Circuit Judge Goldberg permitted the E.E.O.C. to have access to the documentation sought, and in doing so, addressed himself to the manner in which the court should interpret the Civil Rights Act of 1964. Referring to section 703(a)(1) of Title VII of that statute, he said:

> This language evinces a congressional intention to define discrimination in the broadest possible terms. Congress chose neither to enumerate specific discriminatory practices, nor to elucidate in extenso the parameter of such nefarious activities. Rather, its pursued the path of wisdom by being unconstrictive, knowing that constant change is the order of our day and that the seemingly reasonable practices of the present can easily become the injustices of the morrow. Time was when employment discrimination tended to be used as a series of isolated and distinguishable events, manifesting itself, for example, in an employer's practices of hiring, firing, and promoting. But today's employment discrimination is a far more complex and pervasive phenomenon, as the new nuances and subleties of discriminatory employment practices are no longer confined to bread and butter issues...We must be acutely conscious of the fact that Title VII of the Civil Rights Act of 1964 should be accorded a liberal interpretation in order to effectuate the purpose of Congress to eliminate the inconvenience, unfairness, and humiliation of ethnic discrimination. Furthermore, I regard this broad gauged innovative legislation as a charter of principles which are to be elucidated and explicated by experience, time and expertise".

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[1] At p. 894.

[2] 454 F. 2nd, 234 (1971).

The Law

Having shown that human rights legislation is considered to be remedial and to be liberally interpreted, we now turn to the specific issues raised by the complaint in the instant situation and canvas the pertinent decisions. Essentially, the complaint alleges discrimination with respect to employment because of sex. At first appearance, the discrimination in this complaint did not occur because of sex but because of height and weight criteria. These criteria are neutral. However, as will be seen, courts and human rights' Boards of Inquiry have gone beyond a literal reading of the words of the statute and have examined the results of the application of supposedly neutral criteria to see whether discrimination has occurred. In other words, it is the result of the alleged discriminatory criteria and not the intention of the respondent which is determinative.

The Law Generally with Respect to Discrimination on the Basis of Sex

The legal issues in this matter are threefold. First, when the regulations of an employer apply to all prospective employees equally, without the intent of discriminating against either sex, but the result of the application of the employment regulations is to exclude women, is there discrimination within the meaning of section 4(1)(a), (b) or (g) of The Ontario Human Rights Code? Is intent to preclude women a prerequisite to a violation of the statute or is it contrary to the legislation simply to apply employment regulations knowing the result will be to preclude women from employment? My finding is, as will be discussed at length, that intent to discriminate is not a prerequisite

to establishing a contravention of The Ontario Human Rights Code, and that there can be discrimination within the meaning of the statute if the result of applying employment regulations is to exclude women.

The second issue then is - when is such an employment regulation valid and when is it invalid? In my opinion, an employment regulation neutral on the face of it, ie. one that applies to all prospective employees equally but has the effect of excluding women, is valid if it is shown that the regulation is in good faith and is reasonably necessary to the employer's business operations.

The third issue is ancillary to the second issue. If an employment regulation is neutral in its terms, but has the effect of excluding women, does the onus fall upon the employer to establish that the regulation is reasonably necessary to business operations, or does the onus fall upon the prospective employee to establish that the regulation is not reasonably necessary to business operations? In my opinion, for the reasons to be discussed, the onus rests upon the employer in such a situation.

In considering these three issues, it is useful to consider the American and British experience as well as the relevant Canadian jurisprudence. We shall consider the determination of the three issues in all three jurisdictions from the standpoint of human rights' cases generally, and then consider the specific issue of a minimum height standard. In my opinion, the law in each jurisdiction, while somewhat different in form and approach, is the same in purpose, principle, and result with respect to these issues.

The American Experience

In the United States, the concept of discrimination has changed over a period of time.[1]

Early decisions interpreting federal civil rights statutes hold that discrimination occurred when personal antipathy towards a member of a protected minority group motivated the unlawful behaviour. However, it became evident that it was difficult to establish "intention" to harm and as a result, discrimination came to be defined in the courts as 'unequal or differential treatment'.

In City of Highland Park v. Fair Employment Practices Commission[2] an action was initiated by the City of Highland Park to have the Michigan Fair Employment Practices statute declared unconstitutional and vague because it violated due process. Justice Edwards, speaking for the entire court of eight justices held: "The purpose of the statute is to prevent discrimination in employment based on racial, religious or - and ancestral prejudices".[3] Citing a number of cases dealing with discrimination in interstate commerce and unfair competition, he concluded that the word 'discrimination' meant, as found in Webster's New International Dictionary,[4] "to make a difference in treatment or favour (of one as compared with others; as to discriminate in favour of one's friends; to discriminate against a special class)."

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[1] See generally, Alfred W. Blumrosen, "Strangers in Paradise: Griggs v. Duke Power Company and the Concept of Discrimination", (1972) Mich. Law Rev. 59.

[2] 111 N.W. 2nd 797, Supreme Court of Michigan, 1961.

[3] At p. 99.

[4] 2nd Edition, p. 745.

In Courtner v. The National Cash Registry Company,[1] in which an appeal from an order of the Human Relations Council of the City of Dayton in Ohio, was heard by the Court of Common Pleas of Ohio, the National Cash Registry Company had been ordered to cease and desist administering discriminatatory personnel policy regulations which had been held to be contrary to the City of Dayton's general ordinances. Judge Brenton, in considering the words "discriminate" and "discrimination" as found in the ordinance said:

> "Evidently, the enactors of the ordinance did not intend to exclude the accepted meaning of these terms. "Discriminate" means to make a distinction in favour of or against the person or thing on the basis of the group, class or category to which the person belongs, rather than according to actual merit. "Discrimination" means the act of making a distinction in favour of or against a person or thing based on the group, class or category to which that person or thing belongs, rather than on individual merit".

As a result of these and similar holdings, employers at first thought they were permitted to impose any requirement so long as these requirements were imposed on all groups alike. The result was the minority groups were still disadvantaged since common requirements, such as education or height affected minority groups with unequal effect.

However, in 1971, in the Griggs v. Duke Power Company case[2], the Supreme Court of the United States articulated the concept of discrimination wich has now been accepted in Canadian decisions dealing with human rights complaints.

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[1] 262 N.E. 2nd. 586, 1970.

[2] (1971), 191 S. Ct. 849.

Section 703(a) of the United States' Civil Rights Act of 1964,[1] as amended states:

> It shall be an unlawful employment practice for an employer (1) to fail or to refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

In considering the question of whether it is necessary to prove intent as a prerequisite to finding an unfair employment practice, the Supreme Court said in Griggs:[2]

> ...[B]ut good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability.
>
> No willfullness on the part of the employer need be shown to establish a violation of Section 706(g).[3]

This interpretation was accepted in Rogers v. International Paper Co.[4]:

> Notwithstanding the provision in Title VII allowing injunctive relief and back pay only where the respondent has intentionally engaged in unlawful practice, 42 U.S.C. s. 2000e 5(g), courts have established that proof of discrimination does not require proof of intent to descriminate. All that is required is that the employment practice not be accidental.

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[1] 42 U.S.C. §2000e-2(a)(1).

[2] Griggs v. Duke Power Co., (1971), 91 S.Ct.849 (U.S.S.C.) at 845.

[3] (1973), 480 F. 2d 240 (C.A.-3) at 246.

[4] (1975), 510 F. 2d 1340 (C.A.-8) at 1344.

A similar interpretation of section 706(g) has been made in United Papermakers and Paper Workers, Local 189 v. U.S.[1], Jones v. Lee Way Motor Freight Co.,[2] and Sagers v. Yellow Freight System, Inc.[3]

As we shall see shortly, American courts dealing with minimum height standards, or like requirements, and the allegation of discrimination on the basis of sex, have relied upon the approach set forth in Griggs.

> . . .
> Congress directed the thrust of the [1964 Civil Rights] Act to the consequences of employment practices, not simply the motivation. More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question.

The Griggs doctrine has been accepted in subsequent cases such as Albermarle Paper Co. v. Moody:[4]

> If backpay were awardable only upon a showing of bad faith, the remedy would become a punishment for moral turpitude, rather than a compensation for workers' injuries. This would read the "make whole" [secure complete equality] purpose right out of Title VII, for a worker's injury is no less real simply because his employer did not inflict it in "bad faith". Title VII is not concerned with the employer's 'good intent or absence of discriminatory intent' for 'Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation.' Griggs v. Duke 401 U.S. at 432.

The above decisions held it was not necessary to prove discriminatory intent notwithstanding section 706(g)5 of The Civil Rights Act which reads:

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1 (1969), 416 F. 2d 900 (C.A.-5) at 996.

2 (1970), 431 F. 2d 245 (C.A.-10).

3 (1973), 388 F. Supp. 507 (D.C. Ga.), affirmed as modified (1976), 529 F. 2d 721 (C.A.-5).

4 (1975), 422 U.S. 407 (U.S.S.C.) at 422-3.

5 42 U.S.C. §2000e - 5(g).

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice. . .

The United States Court of Appeal in Kober v.Westinghouse[3] has interpreted Section 706(g):

> The intentional unfair employment practices included in Section 706(g) are those practices which are engaged in deliberately rather than accidentally. . .

The British Experience

The concept of indirect discrimination or discrimination without malicious intention appear in the Sex Discrimination Act, 1975 and in the Race Relations Act, 1976.

Section 1 of the Sex Discrimination Act, 1975, making discrimination against males and females because of sex unlawful in such matters as employment services and facilities, defines sex discrimination as follows:

> DISCRIMINATION TO WHICH ACT APPLIES
>
> Sex discrimination against women
>
> 1.—(1) A person discriminates against a woman in any circumstances relevant for the purposes of any provision of this Act if—
>
> (a) on the ground of her sex he treats her less favourably than he treats or would treat a man, or
>
> (b) he applies to her a requirement or condition which he applies or would apply equally to a man but—
>
> (i) which is such that the proportion of women who can comply with it is considerably smaller than the proportion of men who can comply with it, and
>
> (ii) which he cannot show to be justifiable irrespective of the sex of the person to whom it is applied, and
>
> (iii) which is to her detriment because she cannot comply with it.
>
> (2) If a person treats or would treat a man differently according to the man's marital status, his treatment of a woman is for the purposes of subsection (1) (a) to be compared to his treatment of a man having the like marital status.

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[1] (1973), 480 F. 2d 240 (C.A.-3) at 245.

Section 1 is followed by an explicative note which advises that the section was drafted to include passive or indirect discrimination, the kind that the Griggs case was contemplating.

The British National Council for Civil Liberties published a memorandum in April, 1975, discussing the Sex Discrimination Bill which subsequently became law, which says:

> "Indirect discrimination (either on grounds of sex or on grounds of marital status) is also made unlawful in some situations. Indirect discrimination means applying a rule equally to men and women which has unequal effect on them. For example, a rule which said that all lorry drivers employed by a particular firm had to be 5'10" would be indirect discrimination, since fewer women then men would be able to meet that condition. Similarly, a rule which said that only science graduates could apply for a particular job would be indirect discrimination, since fewer women have science degrees then men. But indirect discrimination may still be lawful...provided that it is "justifiable". Presumably, this means that the height requirement for the lorry driver would not be justifiable and would therefore be unlawful; an educational qualification may be justifiable, and could therefore be lawful".[1]

The British Race Relations Act, 1976, forbidding discrimination on the basis of race and colour also incorporates a definition of racial discrimination which is similar to the one we have seen in the Sex Discrimination Act, 1975 and which reflects the concept of indirect discrimination articulated in the Griggs case.

Section 1(1) of the Race Relations Act, 1976 provides:

PART I

DISCRIMINATION TO WHICH ACT APPLIES

Racial discrimination.

1.—(1) A person discriminates against another in any circumstances relevant for the purposes of any provision of this Act if—

(a) on racial grounds he treats that other less favourably than he treats or would treat other persons; or

[1] At p. 2.

(*b*) he applies to that other a requirement or condition which he applies or would apply equally to persons not of the same racial group as that other but—

(i) which is such that the proportion of persons of the same racial group as that other who can comply with it is considerably smaller than the proportion of persons not of that racial group who can comply with it ; and

(ii) which he cannot show to be justifiable irrespective of the colour, race, nationality or ethnic or national origins of the person to whom it is applied ; and

(iii) which is to the detriment of that other because he cannot comply with it.

(2) It is hereby declared that, for the purposes of this Act, segregating a person from other persons on racial grounds is treating him less favourably than they are treated.

The Canadian Experience

Until fairly recently, Canadian Boards of Inquiry perhaps have implied that a malicious discriminatory intent be present before concluding that a complaint of discrimination has been substantiated. Perhaps this has been simply because in most Board of Inquiry situations, the factual issue turns on the intent of the respondent . For example, in the Ontario Board of Inquiry Mitchell v. O'Brien, 1968, a case of discrimination in housing accommodation, the Chairman remarked that for discrimination to occur under the Code it was necessary "to determine whether this denial [of housing accommodation] was because of the race or colour of the complainant".[1]

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[1] At p. 8 (emphasis added).

In a 1970 case involving an allegation of discrimination and conditions of employment, Simms v. Ford, Chairman Horace Krever implied that it was necessary for the respondent to be aware and passively acquiesce in discriminatory behaviour for unlawful discrimination to occur. He said:

> "In my opinion the word "discriminate" in the context of the Code means to treat differently or, in the particular context of s.4(1), to make an employee's working conditions different (usually in the sense of less favourable) from those which all other employees are employed. Thus, to permit, even passively, a black employee in a plant where the majority of the employees are white to be humiliated repeatedly by insulting language relating to his colour by other employees, even I would go so far as to say, by non-supervisory employees, would be to require the black employee to work under unfavourable working conditions which do not apply to white employees".

There is one Canadian human rights decision which presents a fact situation analogous to the complaint of Ms. Colfer. The 1975 case, Roberta R. Ryan v. Chief of Police, Police Committee, Town of North Sydney, chaired by Keith Eaton, involved an allegation of sex discrimination, in that the respondent "did not provide or refuse to provide employment" because of the applicant's sex contrary to s. 11A(1) of the Nova Scotia Human Rights Act. The report quotes the advertisement placed by the respondent which read "APPLICATIONS FOR TWO POLICEMEN" and stipulated that a "height of 5'8" and a weight of 160 lbs. minimum" were necessary qualifications. The complainant was 5'6 1/2" and weighed 125 pounds. The Chairman concluded that no discrimination occurred. He said:

> "On my understanding of the evidence of the Respondent Parsons, I do not consider that, when making his recommendation, [the Chief of Police] discriminated against the complainant because of her sex".[1]

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[1] At p. 18 (emphasis added).

Later on, he added:

> "...[T]here is no evidence to show that the decision made at that meeting [of the town council] regarding the hiring of Mr. Barnes and Mr. Penny [the two successful male applicants for the position] involved any discrimination against the Complainant."[1]

This decision and the reasoning it expresses are common to pre-Griggs Human Rights Boards of Inquiry decisions. It appears the Chairman in the Ryan case would only have been satisfied that discrimination had occurred if discriminatory intent against the complainant was shown to be present.[2]

More recently, Canadian Boards of Inquiry decisions have reflected the American view that it is not necessary to find an intention to discriminate. The motivation of the respondent is not necessarily the determining fact.

In a 1976 British Columbia decision, Human Rights Commission v. College of Physicians and Surgeons of British Columbia, the issue was a requirement by the respondent that non-Canadian doctors, newly-licensed in British Columbia by virtue of having passed a special examination, were required to practice in underdoctored parts of British Columbia for a period of time. In other words, there were geographical restrictions placed on newly-licensed, non-Canadian doctors.

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[1] At p. 18 (emphasis added).

[2] The Chairman also found (at p. 18) that the Chief did not have authority to hire, but only to make recommendations to Town Council, and therefore could not have been in violation of the statute.

The Human Rights Commission lodged a complaint that the requirement violated section 9(1) of the Human Rights Code of British Columbia providing for equality of employment opportunities. The Board concluded that discrimination occurred and ruled that the College policy contravened the statute to the extent that it discriminated against non-Canadian doctors with respect to their right to practice free of geographical constraint. Chairman Leon Getz noted that the respondent's policy was one based upon "high public purpose", that is, to make medical services available in British Columbia's underdoctored areas. He said:

> "We have no doubt that the principal motivation of the College in adopting the policy under review was a wholly laudable one".[1]

The Board also observed that the College administered this discriminatory policy with "tact and sensitivity" making allowances where special hardship or inconvenience had been shown and granting exemptions. But, the Board concluded:

> "...[T]he result of its [respondent's] policy is to discriminate against non-Canadian doctors on grounds quite unrelated to their qualifications for the practise of medicine, and in our view this, quite apart from any question of motive, constitutes a form of discrimination without reasonable cause that is prohibited by the Code".[2]

The Board also concluded that in order for the respondent's policy to be non-discriminatory it was necessary that its requirements be related to the qualifications required for the practice of medicine. The Board did not lay down any test or pursue this argument.

> "The conclusion that we have reached - that the policy has nothing whatever to do with qualification for the practise of medicine, becomes inescapable when the circumstances leading to its adoption are considered".[3]

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[1] At p. 8.

[2] At pp. 8,9.

[3] At p. 9.

Mr.Justice McDonald, of the Alberta Supreme Court, Trial Division, in Re Attorney-General for Alberta and Gares[1], held that intent need not be proved to establish a contravention of the Alberta Individual Rights Protection Act[2] even though that statute is not explicit on the question of intent. The employer hospital was charged with discrimination because the collective agreement negotiated with male orderlies provided for a higher wage than did the collective agreement negotiated with the female nurses' aides, even though the duties of the orderlies and aides were substantially the same. The orderlies and nurses' aides had been represented by separate bargaining units. The hospital argued that because of the circumstances of the bargaining processes, there was no intent to discriminate; hence, the hospital should not be liable to the nurses' aides for the shortfall in wages. McDonald, J. found that the discrimination complaint as to unequal wages based on sex was "justified, even in the absence of present or past intent to discriminate on the ground of sex. It is the discriminatory result which is prohibited and not a discriminatory intent."[3]

Thus, the fact that there was no discriminatory intent was irrelevant. The hospital was ordered to pay the lost back wages. The Alberta Individual Rights Protection Act is not express as to the requirement of intent and instead addresses itself to the prohibited conduct:

> s. 5(1) No employer shall
>
> (a) employ a female employee for any work at a rate of pay that is less than the rate of pay at which a male implover is employed by that employer for similar or substantially similar work.

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[1](1976), 67 D.L.R. (3d) 635.

[2]1972 S.A., c.2.

[3](1976), 67 D.L.R. (3d) 635 at 695 (emphasis added).

Parliament has recently enacted the Canadian Human Rights Act.[1] That statute states it is not necessary to prove discriminatory intent in order to establish that an infraction has occurred.

Section 41(3) reads:

> In addition to any order that the Tribunal may make pursuant to subsection (2), if the tribunal finds that (a) a person is engaging or has engaged in a discriminatory practice willfully or recklessly, or (b) the victim of the discriminatory practice has suffered in respect of feelings or self-respect as a result of the practice, the Tribunal may order the person to pay such compensation to the victim, not exceeding five thousand dollars, as the Tribunal may determine. [emphasis added]

The inclusion of the words "willfully" and "recklessly" in s. 41(3) must mean that where there is no intent to discriminate but nevertheless a discriminatory result, the Tribunal may still make an order against the discriminator pursuant to s. 41(2); that is, an order to cease the discriminatory practice, compensate the victim for lost wages or for extra expenses, and/or to make available to the victim, on the first reasonable occasion, such opportunities as were previously denied the victim.

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1 S.C. 1976-1977, c. 33 , cf. The Sex Discrimination Act, 1975 Law Reports Statutes, c.65, s.1(b), and the Race Relations Act (1976) of the United Kingdom, which cover 'unintentional discrimination'. See generally, Review of Race Relations Act, Community Relations Commission, London, 1975.

In a 1975 case, Tharp v. Lornex Mining Corporation Ltd., a Board of Inquiry considered whether a complainant was discriminated against, contrary to s.8 of the Human Rights Code of British Columbia. The female complainant required accommodation at the employer's copper mine site. The Board said:

> ". . . Lornex failed to offer to the Complainant toilet and washroom facilities which could be used with the same degree of privacy provided to the male residents of the other bunkhouses and, indeed, to all male residents prior to her arrival. The privacy that was missing was freedom from intrusion from the opposite sex. We have concluded that Ms. Tharp was discriminated against by virtue of the nature of the accommodation provided to her and that the basis for that discrimination was Ms. Tharp's sex. She was inserted into an exclusively male domain and denied the privacy extended by Lornex to most of the male domain and denied the privacy extended by Lornex to most of the male residents at the campsite. Ms. Tharp was therefore discriminated against on the basis of her sex". [1]

The Board dealt with the respondent's argument that male and females were treated equally with respect to accommodation.

> "The position of Lornex from the outset was that it could not be discriminating against Jean Tharp because it was offering her precisely the same accommodation that it offered every other employee at the campsite. In other words, it was contended that there can be no discrimination where everyone receives identical treatment. We reject that contention. It is a fundamentally important notion that identical treatment does not necessarily mean equal treatment or the absence of discrimination. We would add only that the circumstances of this complaint graphically illustrate the truth of this important notion". [2]

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1. At p.12.
2. At p.13.

In Singh v. Security and Investigation Services Ltd., 1977, I decided that intent was not a necessary component in a complaint of discrimination. Security's employment regulations required its security guards to be clean-shaven and to wear caps. I stated :

> "To summarize, Security's employment regulations have resulted in discrimination against Mr. Singh, a Sikh, because of his creed. Although Security did not intend to discriminate against any religious group in the application of its employment regulations, the effect of the application of those regulations, as known by Security, would be to preclude Sikhs from employment with Security.
>
> Security is bound to accommodate its employees' and prospective employees' religious practices unless Security can demonstrate that it is unable to reasonably accommodate an employee's or prospective employee's religious practice without undue hardship on the conduct of its business. Security has not met, and in my opinion is not able to meet, this onus in the factual situation before this Inquiry." 1

Section 4 of The Ontario Human Rights Code provides no guidance as to whether an act of discrimination in employment need be "intended", but the phrase "intention to discriminate" does appear in s.1(1) of the Code. Subsection 1(1) provides:

> "No person shall publish or display or cause to be published or displayed or permit to be published or displayed any notice, sign, symbol, emblem or other representation indicating discrimination or an intention to discriminate against any person or any class of persons for any purpose because of their race, creed, colour, sex, marital status, nationality, ancestry or place of origin of such person or class of persons." [emphasis added]

It seems that the prohibition in this provision extends to an action resulting in discrimination, even if intent to discriminate is absent. Subsection 1(1) has not been the subject of a Board of Inquiry in Ontario. In Saskatchewan, a section very similar to s.1(1) was given close

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1 At p. 35.

scrutiny by Judge Tillie Taylor in 1976 in Barry Singer v. Iwasyk and Pennywise Foods Ltd. This experienced chairperson concluded that the display of a black caricature by the respondent as part of a restaurant's advertising was discriminatory even if no intention to discriminate was present. The chairperson held the respondent violated the equivalent of s.1(1) to the extent that this caricature "indicated discrimination". She said:

> "We find that, although Mr. Iwasyk and Pennywise Foods Ltd. did not intend to discriminate, they did display a sign and published representations which indicated discrimination against black or brown persons as a class..." [1]

One may similarly conclude that s.4 of The Ontario Human Rights Code, with which we are concerned in this complaint, and which does not even include the words "intention to discriminate" that appear in s.1(1), is contravened if the result of the respondents' employment practices is discriminatory, regardless of intent.

Conversely, it is not enough, of course, to have simply an intention to discriminate, without an act pursuant to that intention. In Nelson and Atco Lumber Company Ltd. v. Borko et al.[2], Mr. Justice Toy of the British Columbia Supreme Court quoted with approval the Board of Inquiry decision appealed from:

> "There is nothing in the Human Rights Code of British Columbia that suggests to me that in the field of civil rights or provincial crimes a person can be held civilly accountable or responsible in a summary conviction court for his thoughts, intentions or a state of mind. There must be, in my view, an overt act or result flowing from the person's thoughts or state of mind before another

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1 This decision was overruled on other grounds on an appeal to the Saskatchewan Court of Queen's Bench in a decision by Mr. Justice Hughes, Oct. 5, 1977.

2 (1976), B.C.L.R. 208 at 212. The Board of Inquiry decision was reversed for other reasons.

> person's civil rights can be invaded or the state needs protection. Accordingly, the finding hereinbefore quoted in para. 23(a) of the stated case cannot stand as a contravention of s.8 [am. 1974, c.114, s.6] of The Human Rights Code."

The Law with respect to the specific issue of a height and weight requirement for police officer applicants

It is now well established in Canadian and United States decisions, and in the United Kingdom as well, by virtue of the statutory provisions in The Race Relations Act, 1976, and The Sex Discrimination Act, 1976, that intent to discriminate need not be shown. If the result of an employment practice is to be discriminatory against a group protected by human rights legislation, that practice is in contravention thereof. We have noted a 1975 Nova Scotia case[1] alleging discrimination on the basis of sex in employment against the Sydney Police Force, which raises the issue of height and weight requirements. That decision, however, apparently rests on the belief, mistaken in my view, that discrimination requires intention to discriminate. In reviewing Canadian Boards of Inquiry decisions I can find no other fact situation raising the question of height or weight requirements.

However, in the United States, commencing in the mid-70's, there has been a veritable flood of complaints similar to the one before this Inquiry, based on s.703(a)(1) of The Civil Rights Act, 1964.

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1 Roberta R. Ryan v. Chief of Police, Police Committee, Town of North Sidney, discussed supra.

The legal principles in these decisions amount to the following propositions. First, the complainant must show the court a prima facie case of discrimination as a result of the respondent's height and weight requirement. Second, if the court is satisfied that these requirements have a disproportionate impact on one of the protected groups under the civil rights legislation, the onus then falls upon the respondent to show that the requirements in question are job-related. Third, if the respondent fails to discharge this onus, the requirements are considered discriminatory and illegal.

Before presenting the American cases dealing specifically with height and weight requirements, it is instructive to examine two early decisions dealing with the employment section of The Civil Rights Act, 1964. The judicial remarks made in these two cases highlight the approach that subsequent judges have used in dealing with height and weight requirements. In the case of Mary Sprogis v. United Air Lines[1], the plaintiff claimed that her employer discriminated against her because of her sex because the employer had a no-marriage rule for its stewardesses but not for its male counterparts. Circuit Judge Cummings of the United States Court of Appeal, 7th Circuit, said:

> "The scope of s.703(a)(1) is not confined to explicit discriminations based"solely" on sex. In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from stereotypes. Section 703(a)(1) subjects to scrutiny and eliminates such irrational impediments to job opportunities and enjoyment which have plagued women in the past. The effect of the statute is not to be diluted because discrimination adversely affects only a portion of the protected class. Discrimination is not to be tolerated under the guise of physical properties possessed by one sex...or through the unequal application of a seemingly neutral company policy..." 2

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1 444F 2d 1194 (1971).

2 At p.1198.

In Gloria LeBlanc v. Southern Bell Telephone and Telegraph Company and Helen Roig v. Southern Bell Telephone and Telegraph Company,[1] District Judge Heebe stated:

> "...[W]e have the treadworn assertion of the state that "there are differences between the sexes...sociological, physiological and biological...which justify rational generic classification,"... and that a prohibition on women working in excess of eight hours a day or 48 hours a week is such a rational generic classification. We join with courts across the nation in condemning such "stereotyped classification" as failing to constitute a bona fide occupational qualification and hence as unlawful employment practices in violation of Title VII".[2]

Castro et al. v. Beecher,[3] heard in the United States Court of Appeals, First Circuit, is one of the earliest cases in which a height requirement was alleged to be discriminatory.

This case stands for the preposition that a complainant must prove that the height requirement has "a disproportionate impact" on the minority group in question. The complainants were six black and two Spanish-surnamed residents of Boston who claimed violations of their civil rights in the police recruiting and hiring practices of the defendants, the members of the Massachusetts Civil Service Commission, the Director of Civil Service, and the Commissioner of the Boston Police Department. Among their several claims of discrimination the complainants alleged the use of a non-job related and discriminatory written examination, 5'7" minimum height requirement and a 100 yard swimming test.

Judge Coffin's opening remarks indicate that intent to discriminate was not a necessary prerequisite to the complainants being successful.

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1 333F Supp. 602 (1971).

2 At pp.608-09.

3 459F 2d 725 (1972).

> "This case epitomizes the classic, clumsy and yet unavoidable attempt to rectify, through the courts, long-standing though not consciously intended discriminatory selection policies in public employment in a northern community".[1]

He noted that it was necessary for the plaintiffs to make out a prima facie case of discrimination based on the respondent's minimum height requirements. He said:

> "Quite simply, the plaintiffs have failed to demonstrate that a minimum height requirement has a disproportionate impact on Spanish-surnamed persons. Nor can a court employ a rigorous standard of review on the basis of a mere supposision that a classification has such an impact...In the absence of showing of prima facie discriminatory impact, the [court's] standard of review [of height requirement] is, as we have indicated, a relaxed one, which a minimum height requirement for policemen clearly meets".[2]

In Smith v. Troyan,[3] the complainant was a black woman who alleged that the use by the City of Cleveland of minimum height and weight requirements in hiring police officers unconstitutionally discriminated against her on the basis of sex. The Lower Court had held that the height and weight requirements were unconstitutional but on appeal, Circuit Judge Peck ruled that the minimum height requirement of 5'8", although it disqualified 95% of women applicants and only 45% of male applicants, did not unlawfully discriminate against women because it was "rationally supported". However, he also held that a 150 pound weight requirement disqualifying 59% of men and 99% of women was unlawfully discriminatory because it lacked rational support.

It is important to note that this complaint was not alleged on the basis of violation of The Civil Rights Act of 1964, but rather was on the basis of the height and weight requirements being unconstitutional because

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[1] At p.727.

[2] At p.734.

[3] 520F 2d 492 (1975), United States Court of Appeals, 6th Circuit.

they denied "equal protection of the laws".[1]

Judge Peck found that the height requirement of the respondents had rational support because of the nearly universal use of such requirements in hiring police. He said:

> "That certain government entities . . . no longer utilize or favour height requirements cannot rebut the nearly universal use of height requirement in hiring police. Such widespread use, of course, does not compel a finding of constitutionality, but 'is plainly worth considering' in determining the 'rationality' and constitutionality of height requirements." [2]

In Mieth and Rawlinson v. Dothard,[3] the United States District Court of Alabama heard a challenge by two women to the minimum height and weight requirements for employment as a state trooper and correctional counsellor. It was necessary to be 5'9" tall and weigh 160 pounds to be a state trooper, while a correctional counsellor had to be at least 5'2" and weigh 120 pounds. These requirements were attacked as being contrary to The Civil Rights Act of 1964.

Circuit Judge Rives, in a per curiam decision, summarized the applicable legal principles. He stated that if an employment practice was shown to have a substantially disproportionate effect upon a protected

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1 Judge Peck points out in a footnote on p.493: "Noteworthily absent in plaintiff's complaint. . .were references to Title VII of the Civil Rights Act of 1964. . . Of course, what Title VII compels may differ from what the equal protection clause, in itself, compels . . .".

2 At p.496.

3 418F. Supp. 1169 (1976).

minority, it was not necessary to prove a discriminatory purpose, citing the Griggs v. Duke Power Co. decision of the U.S. Supreme Court.[1] Moreover, once a plaintiff demonstrated a prima facie case of discrimination under this disproportionate impact analysis, the burden shifts to the employer to prove that the disqualifying employment practice has a "manifest relationship to the employment in question".[2] If the employer failed to meet this burden the plaintiff could show that the challenged requirement was but a pretext for discrimination by showing that other selection devices could have been used by the employer which did not have a discriminatory impact. The court also stated that where sex is a "bona fide occupational qualification", employers may treat their employees differently on the basis of sex.

However, the court stressed that the "bona fide occupational qualification" doctrine is a narrow exception to the general rule that there must be equality of employment opportunities.[3]

The court concluded that the height requirement for the state trooper position is "not rationally related to the achievement of any legitimate state interest"[4] and therefore unlawful. The court expressly disagreed with the decision in Smith v. Troyan as to the evidence of height being an advantage to the functions of a police officer: "the credible evidence in this case is to the contrary. Tall officers do not hold an advantage over their smaller colleagues in job performance".[5] The court stated also that

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1 At p.1179.

2 At p.1179.

3 At p.1182.

4 At p.1182.

5 At p.1182.

there must be strong justification "for blanket exclusion from employment of all individuals under a specified height".[1] The court added:

> "One lesson the women's rights movement has taught us is that many long-held conceptions concerning the sexes have been found to be erroneous when exposed to the light of emperical data and objectivity."[2]

The court also found that the height and weight requirements were discriminatory in relation to the position of correctional counsellor. The court accepted plaintiff's expert testimony that height and weight requirements bore no relationship to the duties performed by a correctional counsellor and that a height and weight requirement "impermissibly restricts qualified individuals without giving them an opportunity to demonstrate their merit".[3] As a result, the court concluded that height and weight requirements were discriminatory against the complainants.

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1 At p.1182.

2 At p.1182.

3 At p.1183.

In Boyd v. Ozark Air Lines Inc.,[1] the respondent's minimum height requirement was upheld in principle but revised downward. The plaintiff was a female who wanted to become an airline pilot. Although she was otherwise fully qualified she was only 5'2" while the defendant required its pilots to be between 5'7" and 6'2" in height. The court stated:

> "It was conceded by virtually every witness herein that a pilot must have free and unfettered operation of the controls in the aircraft. The cockpits of the airplanes involved herein are designed around a design eye reference point. When a pilot is seated so that his eyes are in this reference point he has the ability to see over the glare shield of the plane and still be able to view and reach all the instruments inside the cockpit. Should a pilot sit below the design eye reference point, the change in the angle of vision can cause a distorted view of the land below, thus causing landing difficulties."[2]

The evidence clearly established that the 5'2" plaintiff would be unable to fly safely the two types of airplanes used by the respondent. The complainant adduced statistical evidence to show that the defendant's minimum height requirement had a disproportionate impact upon women. This, combined with the fact that the defendant did not have women among its pilot employees, established a prima facie case of discrimination. Accordingly, the court noted, the burden then shifted to the defendant to establish that this height requirement was job-related and a business necessity. To establish that a practice was a business necessity operating as a defence to a charge of sex discrimination, the defendant was required to show that this requirement fostered "safety and efficiency and is essential to that goal".[3]

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1 419 F. Supp. 1061 (1976), United States District Court, E.D. Missouri.

2 At p.1063.

3 At p.1064.

The court quoted Robinson v. Lorillard Corporation:[1]

> "The business purpose must be sufficiently compelling to override any ... [sexual] impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptably alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential ... [sexual] impact."[2]

The court concluded that the height requirement was a business necessity since the cockpit could only accommodate a range of height. However, the court ordered that the minimum height requirement be revised from 5'7" to 5'5" because this, the court stated:

> "would lessen the disparate impact upon women, [and] would be sufficient to ensure the requisite mobility and vision."[3]

Thus, the court concluded that the imposition of the height requirement was both job-related and a business necessity, but that the height requirement was unnecessarily high and, to that extent, violated The Civil Rights Act of 1964.

A recent case, adopting the view that a height requirement is discriminatory, is United States v. City of Chicago et al.[4] This case,

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1 444 F.2d 791, 798 (4th Cir. 1971), cert. dismissed, 404 U.S. 1006, 1007, 92 S.Ct. 573, 30 L. Ed. 2d 655.

2 At p.1064.

3 At p.1064.

4 (1976) 411 F. Supp. 218 (1976), 2 affm'd. (1977) 549 F. 2nd (C.A.-7) 415.

started in 1969, was resolved seven years later. The litigation is a consolidation of complaints alleging a pattern of racial and sexual discrimination by the defendants with respect to employment, promotion, assignment and discipline in the Chicago police department, in violation of Title VII of the Civil Rights Act, 1964, as amended by the Equal Employment Opportunity Act of 1972.

During the trial, the height requirement issue was resolved when the defendants simply ceased to continue to impose it. District Judge Marshall, however, made it very clear that height requirements were discriminatory against women "absent a persuasive showing of job-relatedness which has not been made".[1]

> "...[T]he City defendants prescribed a minimum height of 5'4" for all applicants. Upon objection by the Government and the...plaintiffs, the test was administered without the imposition of that requirement.
>
> An employment requirement based on height appears neutral on its face. However, if the neutral requirement is shown to have a markedly disproportionate impact on a given class of applicants, a prima facie case of discrimination is established. [Griggs v. Duke Power Company cited in support.]
>
> The evidence shows that while the announced 5'4" height requirements excluded only 7.5 per cent of the eligible males, it will exclude 65 per cent of the eligible females.
>
> In these circumstances, the burden is upon the City defendants to validate the 5'4" requirement by proving that it is job-related. Of course, physical strength, of which size is an element, is an important if not essential attribute for those who engage in much of the work which police officers do...
>
> Because the announced height requirement has not been applied by the City defendants, it will not be specifically included in the injunction. But it does, in our judgment, fall within the scope of the decree's general prohibition of discrimination against women,

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[1] At p.231.

> absent a persuasive showing of job relatedness which has not been made".[1]

The respondent appealed and was successful to the extent that the Court of Appeals for the Seventh Circuit[2] permitted a deviation from the hiring quotas imposed by District Court Judge Marshall. However, the Court of Appeals affirmed the correctness of the legal principles which the lower court had adopted in dealing with the civil rights legislation and the minimum height standard, as discussed. Citing Griggs, the Court of Appeals held that a test for employment or promotion having a disproportionately adverse effect on protected groups was unlawful unless it was demonstrably related to job performance.[3] The Court of Appeals stated that upon a showing of disparate effect on minority applicants, the burden then shifted to the employer to show that the given requirement had a manifest relationship to the employment in question and that the disparity created by the requirement is the product of nondiscriminatory factors.[4]

The court also made it clear that since civil rights legislation explicitly prohibited sexual as well as racial discrimination, the standards and general principle laid down in Griggs would be applicable when sex, as well as race, is at issue.[5]

When the City of Chicago contended that it did not discriminate against women because other law enforcement agencies also discriminated, the court stated:

> "It is no defence to a charge of discrimination that not everyone else is in compliance with the law. We therefore affirm the District Court's holding that sexual discrimination within the police department violated Title VII."[6]

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1 At pp.230-231.

2 549 F. 2d 415 (1977).

3 At p.427.

4 At p.427.

5 At p.427.

6 At p.435.

In League of United States-American Citizens et al. v. The City of Santa Ana,[1] the complainant brought action against the defendant challenging that certain tests used by the City to screen out applicants for positions as police and fire fighters were discriminatory. District Judge Ferguson noted that Mexican-American individuals comprised 25.8 per cent of the general population of the City of Santa Ana, but only 9.2 per cent of the police officers and 4.2% of the fire fighters. It appears from the fact situation that the height rrequirements which had been in existence (5'8" for policemen, 5'7" for fire fighters) ceased to be applied prior to the case going to trial. However, Judge Ferguson devoted several pages to the issue of height requirements, stating:

> "In a series of decisions, the Equal Employment Opportunity Commission has invalidated height requirements that operated to exclude protected groups in the absence of a showing that the requirement was so necessary to the safe and efficient operation of his business as to justify the policy's discriminatory effect."[2]

When the defendants relied upon Smith v. Troyan, Judge Ferguson distinguished Smith v. Troyan on three separate grounds,[3] and concluded:

> "The defendants here too have failed to justify the height standard and the plaintiffs have established that the use of the height requirement

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1 (1976), 410 F. Supp. 873 (O.C. Calif.).

2 At p.898.

3 At p.900.

applied by the defendant was in violation of Title VII and the general Civil Rights Act."[1]

In The Guardians Association of the New York City Police Department Inc.,et al. v. Civil Service Commission of the City of New York et.al.[2] the complainants were minority police officers who brought action challenging the legality of the employment practices of the New York City Police Department. District Judge Carter found that the height requirement was discriminatory and granted the injunction requested, stating:

"The pervasive use of height standards observed earlier bespeaks a widespread belief among the law enforcers that the height of a police officer has an important effect on his job performance. These views, however, have recently come under attack and their validity has been seriously questioned. The fact that the use of height requirements are a time honoured or widely accepted practice does not automatically save them from a claim of discrimination. As has been seen in the areas of race and sex discrimination, long accepted stereotypes too often help perpetuate discriminatory practices even though they have no basis in fact. The federal government has demonstrated its concern that height requirements not be improperly used to exclude minority groups from employment as law enforcement personnel. E.E.O.C. guidelines, 29 C.F.R. No. 1600.1(b). In order to defend a minimum height standard successfully, the defendants have to show that it was actually job-related. This they have failed to do."3

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1 At p.900.

2 (1977), 431 F. Supp. 526 (D.C. N.Y.).

3 At p.551. See also Officers for Justice v. Civil Service Commission of San Francisco, 395 F. Supp. 378 (1975).

In Hardy v. Stumpf,[1] the California Court of Appeal, in considering the 5'7" height standard of the City of Oakland police force, had this to say:

> [7] The trial court found that the size requirement was reasonable and necessary to the normal operation of the duties of a police patrolman. It is this finding which is unsupported by the type of evidence which must justify discriminatory treatment. Respondents sought to justify the size requirements solely on the ground that physical strength is necessary to the duties of a patrolman, specifically in the restraint of hostile and struggling persons during an arrest or fight, in lifting and carrying persons, and in pulling persons from wrecked automobiles. It was not disputed that physical strength is related to the performance of these duties. It is only disputed that a person must be 5 feet 7 inches tall and weigh 135 pounds to perform these tasks. Applicants for patrolman are tested before acceptance for strength, agility, stamina, endurance and flexibility. No explanation was offered as to why a person below 5 feet 7 inches who passed the physical tests would not have the strength to perform the duties of a patrolman. James M. Newman, Director of Personnel, testified that, in his opinion, substantially all persons under the size requirements could not perform efficiently. He had done no studies to confirm his opinion that the smaller the officer, the less adequately her performed. He could not recall any specific case to substantiate his opinion. No tests had been done to determine how well persons under 5 feet 7 inches could perform. He had never observed women in the performance of duties similar to those required by patrolmen and was unfamiliar with any tests of women. His opinion that substantially all persons under 5 feet 7 inches would be unable to perform the duties of a patrolman being unsupported by any facts is no more than the stereotyped generalization evidence which has been held insufficient to justify dissimilar treatment of the class. (See Frontiero v. Richardson, supra, 411 U.S. 677, 682-688, 93 S.Ct. 1764, 36 L.Ed.2d 583).

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[1] 37 Cal. App. 3d, 958.

[2] At p. 744.

I note in surveying the cases, the decision in Laffey et al v. Northwest Airlines Inc.[1] The court found a violation of Title VII of the Civil Rights Act of 1964, and that the defendant discriminated against females:

> "By forbidding only female cabin attendants to wear eyeglasses, to be without cleaning allowances, to have free choice of luggage, to have single rooms on layovers to be without weight prescriptions and weight monitoring and by imposing a shorter maximum height requirement for female cabin attendants.[2]

One would infer that the defendant in that case was of the view that a female person over a certain maximum height was less attractive than shorter females, and therefore should not be employed. Must 'too tall' females be police officers and 'too short' females be stewardesses?

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1. (1973), 366 F. Supp. 763 (U.S. D. Ct., Columbia).

2. At p.790.

Once a prima facie case of discrimination has been made out, as we have seen, the American decisions place the onus on the employer to prove that the discriminatory practice or "policy is so necessary to the operation of his business as to justify the policy's discriminatory effects".[1]

If one falls back upon the philosophy expressed in The Ontario Human Rights Code it follows that the onus should fall upon the employer to demonstrate that he is unable to reasonably accommodate to a prospective employee's gender without undue hardship on the conduct of his business, once a prima facie case has been established of discrimination through the application of the employer's employment regulations.

> This idea of human equality evolved in Europe during the past three centuries, drawing on a Judaeo-Christian tradition, responding to the imperatives of a modernizing society, and backed by the evidence of social science on the shaping influence of environment, has placed the onus on those who wish to discriminate, to provide a justification for the proposed differential treatment. It may be expressed in the form of a practical maxim: 'treat all men as equal, unless there are good reasons to the contrary'.
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> . . .
>
> But it is not enough to require the giving of reasons, for, if that were enough, it would be in accordance with this principle, for example, 'to treat black men differently from others just because they were black, or poor men differently just because they were poor, and this cannot accord with anyone's idea of equality'. . . The reason given must also be relevant to the difference which is sought to be made in the way people are treated.
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> . . .

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[1] CCH EEOC Decisions (1973) ¶6180 at p.4306.

> An employer is, of course, entitled to reject an applicant who is not properly qualified for the job for which he has applied, so long as he does not regard colour, race or ethnic or national origins as part of the requisite qualifications. It is for the person alleging unlawful discrimination to show that he had the necessary qualifications. If he does so, and the job is available, it is for the alleged discriminator to prove that the applicant was not rejected on grounds of colour, race, etc.[1]

This quotation, expressed in respect to the law of Great Britain, is equally applicable to the Ontario legislation.

Placing the onus on the employer to prove undue hardship on his business is a very sensible approach. The employer is in the best position to understand and explain why his hiring practices are dependant upon the operation of his business. Such an explanation may involve detailing facets of the employer's business organization, known only to the employer. A prospective employee may know so little about the overall structure of the business that it may only be possible for her to make out a prima facie case of discrimination. To require the victim of discrimination to prove in detail that there would have been no unfair inconvenience placed on the employer by hiring her, is to assume that the prospective employee is in a position to know intricate details of the prospective employer's management policies. Moreover, it is always difficult to prove a negative proposition. To place the burden of proof, beyond the requirement of establishing a prima facie case, on the victim would place her in an untenable position. It is the employer who is most able to rebut the presumption, if in the particular case the presumption is fairly rebuttable.

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[1] A Lester and G. Bindman, Race and Law, op. cit, at pp. 75, 187, 188, Penguin, Eng., 1976.

A comparison with labour arbitration cases is useful as the function of the Board of Inquiry under The Ontario Human Rights Code and an Arbitration Board hearing a grievance under the Labour Relations Act is similar. The arbitrator in Northern Electric Office Employee Association in re Northern Electric Company,[1] comments on the onus of proof in Ontario when a grievor complains of an unfair dismissal:

> When a grievance is presented, an obligation falls upon the association to present some proof that the company has been capricious, arbitrary, discriminatory, or mistaken. . . . Having made these claims the association asserted that the burden of proof falls on the company ... . . An important point in cases of this nature is the extent of proof that must be advanced by the Union to justify assuming that the burden of proof falls on management. Obviously a mere statement of violation, while sufficient to get the matter into the grievance procedure, is not enough to justify an arbitrator requiring proof from the Company. As a general rule it is necessary for the Union to produce sufficient evidence to convince the arbitrator that there is some reason to believe the charge of violation. If this is done, the burden of proof falls on the management.

Subsection 4(6) of The Ontario Human Rights Code reads:

> (6) The provision of this section relating to any discrimination, limitation, specification or preference for a position or employment based on age, sex or marital status do not apply where age, sex or marital status is a bona fide occupational qualification and requirement for the position or employment. 1974, c.73, s. 2.

[1](1953), 4 L.A.C. 1331 at 1332.

I interpret this excepting provision as placing the onus upon the respondents, once a finding of *prima facie* discrimination (albeit indirect discrimination through the apparently neutral criteria of the minimum height and weight standard) has been made with respect to Ms. Colfer's seeking employment as a police officer. In my view, the respondents must prove on a preponderance of evidence that the minimum height standard of 5'10" is a *bona fide* occupational qualification and requirement for employment as a police constable. In my opinion, the words *bona fide* do not simply mean "good faith" or "honest intention" but require also that the employer show that the minimum height standard of 5'10" is reasonably necessary to the employer's operations as a police force. In my view, any exception to the *Code* is intended to be strictly construed, and the burden to prove the exception lies with the person asserting it.[1]

Another example where an employer would be able to assert successfully such a defence is afforded by a factual situation as seen in *Nelson and Atco Lumber Company Ltd.* v. *Borko et al.*[2] A female applicant for the position of forklift operator had no previous experience, a requirement imposed by the employer. Accordingly, Mr. Justice Toy of the British Columbia Supreme Court held that the complainant, unsuccessful in her application for the position, had no recourse under the relevant human rights legislation. Once there is a *bona fide* qualification required of applicants, it is enough if all applicants are treated equally. Mr. Justice Roy quoted[3] Lord Reid in the House of Lords:[4]

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1 *Cf.* *Betty-Anne Shock* v. *London Drive-Ur-Self Limited and Others* referred to *supra*, at p. 32, and *Meitl* v. *Dothard* referred to *supra*, at p.57 .

2 (1976), 1 B.C.L.R. 212 (S. Ct.).

3 At p. 214.

4 In *Post Office* v. *Crouch*, [1974] 1 W.L.R. 89, [1974] 1 All E.R. 229 at p.238.

> "Discrimination implies a comparison. Here I think that the meaning could be either that by reason of the discrimination the worker is worse off in some way than he would have been if there had been no discrimination against him, or that by reason of the discrimination he is worse off than someone else in a comparable position against whom there has been no discrimination. It may not make much difference which meaning is taken but I prefer the latter as the more natural meaning of the word, and as most appropriate in the present case."

The qualification of experience for employment as in the Nelson case is a fair requirement and presents a relatively easy factual situation to a scrutinizing tribunal. As well, an easy factual situation is presented in the opposite factual situation, where the requirement, neutral on the face of it, is an obvious subterfuge for discrimination.

For example, in United States v. Henshaw Brothers,[1] black military personnel were pressing their right to be able to rent housing units at Fort Lee in Virginia, without being precluded on the basis of race. The court said:[2]

> "...[D]efendants, through their attorney, announced a policy adopted shortly after the black officers had applied for admission to Branders Bridge of not renting in that apartment complex to military personnel below the rank of major.
>
> In the light of the evidence before the Court, including but not limited to statements made by one or more of the defendants of a racial nature, there is no doubt in the Court's mind that the referred to policy was and is nothing more than an attempted subterfuge to bar those black military personnel who have made applications for apartments at Branders Bridge as well as all other blacks from renting."

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[1] (1974), 401 F. Supp. 399 (U.S. D. Ct. Virginia).

[2] At p. 401.

The factual situation before this Board of Inquiry presents a more different situation. The issue to which I must address myself, therefore, is whether the height and weight requirement impermissibly discriminates against Ms. Colfer.

It is obvious under present law that every person does have the right not to be discriminated against in respect of employment because of sex[1] as provided in paragraphs 4(1)(a), (b) and (g) of The Ontario Human Rights Code.

A seemingly neutral job requirement that has the effect of disqualifying a disproportionate number of one sex is prima facie discriminatory. The respondents bear the burden of establishing that the requirements do not discriminate.

Chief Welsh and Staff Superintendent Welsh were the senior police officers who testified on behalf of the respondents. Clearly they believe sincerely that a height of 5'10" is an essential prerequisite. Just as clearly, this requirement excludes almost all women from employment as police officers with the Ottawa police force. This is true from a statistical standpoint in that, on the statistics agreed upon by all counsel, less than 5% of women would meet the 5'10" height requirement.

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[1] The view as to the role of women in society has undergone a revolution in recent years. The language of a 19th century American court, cited in Hardy v. Stumpf, App. 112, Cal. Rptr. 739 at 741, undoubtedly accurately reflect earlier attitudes in Canada as well.

"The early concepts of the functions of women in society were described as follows: "the civil law, as well as nature herself, has always recognized a wide difference in

In my opinion, to sustain requirements which exclude nearly all women from employment as police officers, the 5'10" and 160 lbs. minima must be demonstrably related to job performance. There must be a rational relationship between the size requirements of police officers and the job they must perform. It is not enough for the standards to be based solely upon the stereotype of the large male police officer.

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in the respective spheres and destinies of man and woman. Man is, or should be, women's protector, and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which belongs to the domain and functions of womanhood. The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator...

[because]

"...in view of the peculiar characteristics, destiny, and mission of woman, it is within the province of the legislature to ordain what offices, positions, and callings shall be filled and discharged by men, and shall receive the benefit of those energies...which are presumed to predominate in the sterner sex".

The Evidence as to the Merits of the Minimum Height and Weight Requirements

What is the evidence as to the merits of the minimum height and weight requirements of 5'10" and 160 lbs? The evidence given here must govern.

The testimony of Chief Welsh and Staff Superintendent Clarkin, in summary, amounts to a statement of belief by the Ottawa police force administration that these requirements are necessary because they are significantly positive attributes for a police officer in handling security in crowd control situations, and in being perceived by the public (and, in particular, someone who is in a confrontation situation with the public) as being strong and physically capable of handling an adversary.

Dr. Joyce Sichel gave testimony as part of the complainant's evidence. She has a doctorate degree in applied social pyschology from the City University of New York and specializes in research having to do with the criminal justice system. (Evidence, p.92). Dr. Sichel conducted a study, under her supervision "with respect to the capabilities of female police officers"(Evidence, p.89). Dr. Sichel's curriculum vitae was filed as Exhibit #10, and she has done extensive work with police departments. (Evidence, pp.106, 107). In my opinion she was fully qualified to testify with respect to the questions asked of her, and in any event her qualifications were not disputed by counsel for the respondents (Evidence, p.91).

Dr. Sichel's study, sponsored by the United States' Government's Department of Justice and published under the title, Women on Patrol: A Pilot Study of Police Performance in New York City, (filed as Exhibit #11) was impressive in purpose, methodology of approach, as well as in the published result.

> Q. And how did it come into being? How was it that you were asked to study this? Could you just trace that history for us?

A. Yes, I'd be happy to. The New York City Police Department, which was at present contemplating the hiring of large numbers of women for its patrol force, wanted to know how women would perform as patrol officers in comparison to their male officers who had already been performing patrol for many years. They asked the Vera Institute of Justice to work with them as an expert research group to assist them in designing and executing a study to compare the performance of women to that of their male officers, and the arrangements were worked out with the Department of Justice to supply funds for such a study. I directed as service project director for the study.

Q. Now in carrying out this study, what method was used?

A. We used a variety of research methods. The methodology was of accepted social scientific sorts. The primary method was observation, direct, first-hand observation of the patrol performance of a matched set of 41 female police officers and 41 male police officers. We had research staff who accompanied the officers on their normal patrol tours. We observed 3,625 hours of patrol, and were able to see 2,400 encounters between the police officers that we were studying and at least one civilian. We analyzed the types of actions they performed on patrol; we were able to look at a process which we termed control-seeking activity on the part of the officers, which we considered very crucial to their performance.

We had about 12 observers working on the project, riding around with the police officers who were being studied, and we had about four of these, four of these were research people who worked in-house on statistical analysis and planning of the study.

I would just like to add one thing: one of the unique features of the study, and there had been previous work done in Washington, D.C. to compare the performance of male and female officers, one of the unique features of the New York Police Study was that we employed police to do the observations of the officers as well as civilians. We had half of our observers who were actually police personnel, sworn police officers, both male and female; the other half being civilians hired for the purpose, both male and female. (Evidence, pp. 93-95)

As the New York Police Department had no minimum height requirement for male or female applicants (Evidence, p.95) such a requirement was not a direct consideration in the study. However, the average height of the 41 women considered as subjects in the study was 5'6", with a number being shorter, and for the 41 male subjects the average height was 5'10" (Evidence, pp.95,96, and Table 1 at p.21 of Exhibit #11). She summarized the overall finding of the study.

> A. Yes. In general, I would say, our overall finding was that the women's patrol performance was much more like that of the men's than it was different. Their style of patrol was found to be similar; the kinds of activities they engaged in on patrol were very similar. We had a behaviour recording system that allowed us to analyze the data and determine this. The kinds of techniques by which they attempted to gain control of the citizens during their encounters with them were similar to those used by the men. The emotional state that citizens were left in was no different for the women than it was for the men. The response of citizens to orders by women was no different than it was to orders by men.
>
> Q. Does this include - when you talk about control, does it include anything but cruising around in a car? Does it include crowd control, for instance?
>
> A. Yes, it included incidents which involved crowds of people; it included incidents which involved the restraint of violent citizens; it included the handling of psychotic individuals; it included situations that were rated by the observers as being dangerous, as having a potential for violence; that is correct.
>
> Q. Please proceed. I'm sorry for interrupting.
>
> A. The civilians who were interviewed concerning the performance of the officer who had responded to calls that they were involved with rated the performance of the women higher than they rated the performance of men officers who had responded to calls. This was a statistically significant difference. The women were rated as more pleasant competent and respectful than their male counterparts. There was something about the manner of the

women in their jobs performed for citizens that was highly acceptable to the citizens.

The female officers were, however, found to be somewhat less assertive in their performance of patrol. We noted that they were somewhat less likely to take the initiative in deciding to pick up a job on the street, a little less likely to decide to back up another patrol car that had gone to a job. They were slightly more likely to hang back when there was strenuous physical activity to be performed. In general, they were slightly more passive than the male officers in their performance on patrol.

We believe that these differences are rooted in cultural patterns, mainly revolving around the tradition role of a woman when she is with a man. Our women officers patrolled with male officers because in New York City teams of officers patrol together. Mainly,women who patrolled with male officers, and that was the vast majority of them, tended to defer and to wait for their male partners to make these kinds of decisions about picking up jobs, backing up other cars, and waited for the male officers to pitch in and perform the strenuous physical activities.

We were interested in finding out what would happen when women were not with male officers, and we were fortunate in being able to observe a substantial number of tours where women officers patrolled with other women officers. They behaved somewhat differently on these tours. We were able to note that their assertiveness increased very substantially, that they were much more likely to make decisions and to involve themselves in the activities, the more active aspects of the patrol. (Evidence, pp. 97-99)

She was asked as well about the significance of height in functioning as a police officer.

THE CHAIRMAN: So that your own experience, as it is, goes to the question of the general performance of male and female officers, and in your opinion there is no substantial difference given the view that you've had which is in particular the New York study?

THE WITNESS: That is correct.

THE CHAIRMAN: In that particular study, the average of the males was four inches taller, 5'10", as compared to the average for the women, 5'6"?

THE WITNESS: That's correct.

THE CHAIRMAN: And in respect to the data that came out of that study, and particularly your own observations and that of your researchers, given the group, that particular group, did height appear to have any significance at all?

THE WITNESS: No. Given that particular group of officers that we studied, I would say definitely that height did not seem to be a factor in the performance of the officer.

THE CHAIRMAN: And if I might just pursue this question for the moment, apart from the statistical data in terms of the norm that was produced, the deviation, as it were, from that norm in terms of the particular instances, is there anything you can tell us to help us at all from that data, that is were there particular officers who were extremely tall or extremely short, to your knowledge, and, secondly, if there were, did that seem to have any effect on the performance, their performance?

THE WITNESS: There were women officers who were unusually short, who were perhaps as short as I am. I'm 5'2". I did not know, nor did any of our research staff bring to my attention, any specific deficits or particular merits in the performance of these specific officers. I don't ---

THE CHAIRMAN: So nothing was thrown up to your knowledge?

THE WITNESS: That is correct, that was related to the particular height of the officer, right. I think it is my impression that the variability in height among the male officers was somewhat less than among the females. I don't recall in that sample of 41 officers any men who were either extremely short or extremely tall.

...

THE CHAIRMAN: So according to you, the height requirement, which is a specific issue in this case, do I infer correctly from what you are saying that in terms of physical characteristics of the two sexes the functioning of a police officer is not determined by the difference in those characteristics?

THE WITNESS: Yes, I think that is a fair statement.

MR. SOPINKA: Q. Well, based on that, do you have an opinion whether or not a minimum height requirement is necessary for women or men in the carrying out of police work, the kind of police work that you studied?

A. Based on not only the report that we ourselves produced of our study, the Urban Institute report that's already been referred to, but also based on previous work which has been done in the States concerning women in policing, it is my opinion that there is no minimum height at which a police officer cannot perform patrol adequately, and my personal view is that there should be no minimum height requirements for police officers.

MR. SOPINKA: Thank you very much.

THE CHAIRMAN: When you use that word "patrol", I take it you're using it in the sense of functioning as a police officer?

THE WITNESS: Yes. There are many things which police officers do which are not patrol roles. They may perform clerical work; they may guard prisoners. In fact, women very frequently who are police officers have been used for these functions.

(Evidence, pp. 108,109,112,116, and 117).

Dr. Sichel's evidence in summary, is that, first, in her opinion, based upon her study, women can perform the job of police officer as well as men, and second, that a minimum height requirement is not a meaningful requirement in assessing applicants for the position.

It seems that some studies, including Dr. Sichel's, suggest there are some differences in male and female police officer performances, for example, absenteeism and sick leave (p.57 of Exhibit #11; see also the testimony of Staff Sergeant Shaw at p.185) but such differences are inconsequential, and in any event do not pertain to the question of a minimum height standard.

The size requirements for candidates for the Metropolitan Toronto

police force have been reduced over the years, but for some years now have been 5'8" and 160 lbs. for male officers and 5'4" and 110 lbs. for female officers (Evidence, p.149). The respondent, police chief Harold Adamson, as well as Staff Sergeant Shaw with the Metropolitan Toronto police department, testified that the different standards were based upon national averages (Evidence, pp.150, 162, 163; 180, 181).

Police chief Adamson's testimony pointed out the obvious importance for a police officer to have physical strength on occasion and that he regarded size as an indication of strength (Evidence, pp.162, 163). However, it is clear from the totality of his evidence that he agreed with the opinion of Dr. Sichel, inasmuch as in his experience as well, female police constables function as well as male officers.

> Q. Now, Chief, I would like you to comment on the evidence given by Dr. Sichel, if you can, and give us your opinion as to, based on the experience in Metropolitan Toronto, if you think it is appropriate, that there should be a differentiation and the capabilities.
>
> A. I'll try and recall her evidence as best I can. I agree in many points that the doctor has made with regard to the ability of male and female police officers. I think that there is no difference in ability. We find that our experience with our female officers, our female constables, is that they are just as capable in many instances, and in some instances more so. They have as many talents. They do just as well in Police College. They are accepted well by the public and they do a very fine job.
>
> Q. Are they assigned to any particular type of work more than any other?
>
> A. No. At one time within the force there were assigned mainly to juvenile work and morality work. A few years ago I changed the rules to allow them

to be on patrol, and they are on patrol now. At one time they were not armed; they are now armed and perform the same patrol function as the males. To some extent I find that there would be some hesitancy on my part - I'm going now to my experience - to assign a number of them at one given time to patrol areas of downtown Toronto, either by themselves or in company with another female.

Q. Why is that?

A. Only by reason of their physical size and stature. I have had the opportunity of attending many demonstrations, both non-violent and violent, at which I had police officers female with me who were able to do a good job, but when it comes to actual physical strength they were not understandably comparable to that of the male police officer.

Q. Is physical strength an important element in your opinion?

A. On occasion it is almost vital.

.....

Q. In fact, you were quite complimentary about the work of your hundred females.

A. Well, you know, certainly if I hadn't made it clear, let me do so, that they are very competent and very qualified, and do an excellent job. Now, I don't know how much more I can emphasize it.

Q. Now, you pioneered the move to have them on patrol?

A. Well, pioneered is a rather - there isn't any pioneering; it's done in other cities. I decided that we would try the experiment. It did work.

Q. Then presumably those hundred came in under a requirement that permitted them to be hired if they met the height requirement of 5'4"?

A. That's true.

Q. And they are performing the same kind of jobs as the male police officers?

> A. Well, here again, let me - we have to put some qualifications. Under normal patrol practices, yes. They can answer the calls, they can do all the jobs just as well or better than the men. No question about that, except when it comes to some areas where there certainly is some need for strong, physical presence, and then I suggest to you that it is no competition between them and the men. But that isn't - that's a biological difference.
>
> Q. Right then, But that doesn't prevent you from hiring a woman that is 5'4"?
>
> A. No. (Evidence, pp. 153, 154, 160, 161

Chief Adamson did disagree with Dr. Sichel on the point of the necessity of minimum size requirements. He clearly feels it is necessary to have minimum standards in this regard (Evidence, pp.151, 152). However, the importance of Chief Adamson's evidence for Ms. Colfer's case is two-fold. First, with differentiating size standards for male and female applicants for the position of police officer with the Metropolitan Toronto police force, based upon national averages so thatthere is no disparate effect upon either gender, the police force functions quite well and male and female officers appear to perform their tasks equally well. Second, while Chief Adamson emphasized the need for strength in a police officer, it is obvious at the least, that this requirement can be met with 5'8" and 160 lb. requirements for males and 5'4" and 110 lbs. requirements for females. The point is, with these size standards, the prerequisite as to physical capacity is met through a meaningful physical fitness test, described in the testimony of Staff Sergeant Shaw (Evidence, pp.190 to 197).

The conclusion one reaches from the evidence of Chief Adamson and Staff Sergeant Shaw is that although there is merit in having

some requirements, as has the Metropolitan Toronto Police Department, there is no rational basis for a 5'10" and 160 lb. requirement for a female applicant.

The recruitment approach of the Ottawa Police Force is in marked contrast to that of the Toronto force. I would agree with the court in Hardy v. Stumpf[1] that a non-discriminatory minimum size requirement can be applied. The California court said:

> Some non-discriminatory minimum size requirement is entirely in order, and to the extent that the opinion in this case may be deemed to strike down all such limitation as a matter of law, we cannot agree.[2]

Findings on the Evidence and Law

I find the Respondents have contravened The Ontario Human Rights Code, specifically paragraphs 4(1)(a) and (b), in that they refused to refer or to recruit Ms. Colfer for employment as a police officer, and refused to employ her because of sex. The imposition of the minimum height and weight standards of 5'10" and 160 lbs. have the effect of precluding virtually all female persons from employment as police officers, and specifically Ms. Colfer. The fact this was not the intention of any or both Respondents is not in question. The Respondents knew, or should have known, the effect of the standards with respect to the recruitment of women as police officers. It is the effect of the size requirements that is critical, and I find that the effect of the requirements is discriminatory against women. The onus in such a situation falls upon the Respondents to justify the size requirements as bona fide occupational qualifications, and I find they have not done so. Indeed, I would find on the evidence in this case that there is no rational basis for minimum height and weight requirements greater than national averages. Any minimum height and weight requirements for females cannot be in excess of

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[1]App., 112, Cal. Rptr, 739.
[2]At p. 745.

figures which will result in equality of opportunity for each gender. The size requirements cannot have a disproportionate effect upon one gender.

Although the issue was not raised, I expressly find both Respondents to be proper parties as the object of the complaint, because they are responsible for the recruitment and employment process of the Ottawa police force. I emphasize that the intention to discriminate, or lack thereof, of any individual member of the Ottawa Board of Commissioners of Police, is of no import. The discriminatory result of the minimum height and weight requirements, which was either known or at the very least should have been known, is sufficient to result in a contravention of the Code.

Section 14c of The Ontario Human Rights Code provides that after hearing a complaint a board shall decide whether or not any party has contravened the Code and

> (b) may order any party who has contravened this Act to do any act or thing that, in the opinion of the board, constitutes full compliance with such provisions or to make compensation therefor.

Considering all the circumstances of this case, I do not think it appropriate to award general damages. The essential remedy is for the Respondents to comply generally with the Code, and to comply specifically with respect to Ms. Colfer's continuing application to be a police officer (if she desires to pursue her application) and that this be done in such a way as to minimize any disadvantage to her through the delay caused by the initial rejection of her application and the subsequent proceedings.

Order

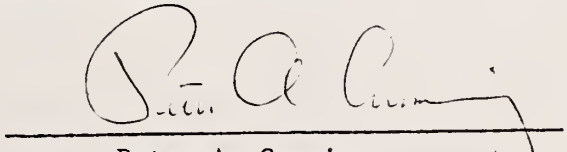
For the foregoing reasons, this Board of Inquiry orders that the Respondent, the Ottawa Board of Commissioners of Police:

(a) direct Ottawa Police Chief Thomas E. Welsh to forthwith cause the Ottawa Police Force to proceed with the Complainant, Ann Colfer's application to be a regular police constable with the Ottawa police force, dealing with that application on its merits, but with disregard to any height and weight requirements;

(b) if Ms. Colfer's application to be a regular police constable is successful on the merits, at the point that she is accepted and placed on the waiting list, her name is to be given a position on the waiting list that is as though it were accepted eighteen months prior to the actual date of acceptance, and she is to be given precedence over other applicants placed on the waiting list in the interval of eighteen months prior to such actual date of acceptance;

(c) either abandon minimum height and weight requirements for all applicants for the position of police constable with the Ottawa Police Force, or impose minimum height and weight requirements for female applicants that result in equality of treatment and opportunity for employment with male applicants, that is, establish different minimum height and weight requirements for male and female applicants so that neither gender, as a group, is discriminated against because of sex in applying for the position of police constable with the Ottawa Police Force.

DATED AT TORONTO this 12th day of January, 1979.



Peter A. Cumming,
Chairman, Board of Inquiry